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STRAY REFLECTIONS ON THE EXPIRING YEAR.

By

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Introduction.—Thomas Mann in "The Magic Mountain" wrote "Time has no divisions to mark its passage. There is never a thunder-storm to announce the beginning of a New Year. It is only we mortals who ring bells and fire off pistols". This is because we would like to believe that "good shall fall at last—far off—at last to all, and every winter change to spring". This is because we would each like to be, in the words of the poet:

"One who never turned his back but marched breast forward,
Never doubted clouds would break,
Never dreamed, though right were worsted wrong would triumph,
Held we fall to rise, are baffled to fight better,
Sleep to wake".

The realist is concerned more with the immediate things than of a far-away future and assesses the happenings of each passing year in the hope of better things during the succeeding year. Thus viewed the expiring year has been, by and large, a year of disappointment rather than of achievement both at home and abroad. Within the country economic conditions have not improved; use of violence against relatively weaker sections has increased; student problems resulting from indiscipline have been multiplying; lawlessness including robberies in trains and other transport vehicles is mounting, chain-snatchers, Road-side Romeos and Eve-teasers continue to be on the prowl haunting the highways and bye-ways. Turbulence and turmoil, restlessness and resort to violent means to achieve different ends, inflation, etc., are not confined to any one country but have become features of international life as well. Noteworthy events in the international sphere during the year are the attempts at assassinating President Ronald Regan of the U.S.A. and Pope John Paul II; the assassination of President Anwar Sadat of Egypt; the wanton act of aggression by Israel in destroying a nuclear reactor in Iraq; the continuing war activities between Iran and Iraq; the out-of-all proportion of the build-up of the Diego Garcia naval and air base etc.

New U.N. Secretary-General:—After serving for two terms Count Kurt Waldheim is retiring from the post of the Secretary-General to the U. N. Dr. Waldheim had rendered yeoman service in the cause of the poorer and underdeveloped nations and maintained the great traditions associated with the post.

The 61 year old Peruvian diplomat. Mr. Javier Perez de Cuellar, has been chosen to be the next U. N. Secretary-General, and wil take over from Mr. Kurt Waldheim on New Year's day. He will hold office for five years.

The Council's search for a new Secretary-General had begun on 27th October, and, after six weeks of balloting, ended somewhat dramatically. Out of a total of seven new candidates who had stepped into the race after the initial contenders. Mr. Waldheim and Mr. Salim A. Salim of Tanzania, withdrew, six were knocked out by the Security Council which elected Mr. Cuellar in the very first ballot held: Mr. Cuellar will find his past experience as Under-Secretary of the U.N. and more recently as the U. N.'s strouble-shooter in Afghanistan useful in his new assignment. It is however an unenviable job he is shouldering which calls for considerable dexterity and grit to steer through the labyrinth of the U.N., where each one of its more than 155 members emphasises its own sovereignty and each of the five permanent members of the Security Council "insists on keeping a hand on the wheel".

Dr. Nagendra Singh's re-election:—From the point of view of our country, a particularly pleasing thing was the re-election of Dr. Nagendra Singh as a Judge of the International Court of Justice, on 5th November. Dr. Nagendra Singh, 67, has been re-elected Judge of the Internation Court of Justice at The Hague for a second term of nine years beginning 6th February, 1982.

His re-election is a distinction for India and Dr. Nagendra Singh's candidature had the backing of 26 countries including the U.S. the U.S.S.R., France and West Germany.

The U. N. General Assembly and the Security Council on Thursday elected five new judges including Dr. Nagendra Singh to The Hague Court to fill vacancies.

First Woman Judge of the U. S. Supreme Court:—For the first time in the history of the Supreme Court of the United States of America, a woman has been appointed Judge of that Court. In the case of the Supreme Court of India it is a pleasure yet to come. There are now a number of women-Judges in many of the Indian High Courts though so far as the Madras High Court is concerned none has been elevated to the Bench till now. It is to be hoped that one will soon emerge.

Judge Sandra Day O'Connor's place in history is already secure as the first woman on the United States' Supreme Court. She was sworn in an Thursaday (24th September). She became the 102nd justice. She graduated near the top of her law class 29 years ago; she who had been refused a job at every law firm to which she applied, took her place on the bench, the seat at the far end reserved for the most junior judge. Mrs. O'Connor was born on 26th March, 1930. She graduated from Stanford University with a Bachelor of Arts degree in 1950 and with a law degree two years later. Mrs. O'Connor spent six years in private practice in Arizona, then served as Assistant Attorney-General for the State from 1965 through 1968. When an opening occurred in the Arizona Senate in 1969 she was temporarily appointed to fill the slot. Subsequently, she won election to two full terms and in 1973 was elected majority leader.

She left the legislature in 1974 to run for Superior Court Judge in Phoenix. She served on that Court until she was appointed to the Arizona Court of Appeals in 1979. From there she has been elevated to the Supreme Court.

The European Parliament:—A pointer to the manner in which a world Government and world community may evolve is afforded by the European Economic Community and its organisations. The week-long visit of a delegation of the European Parliament which arrived in New Delhi on 22nd November, at the invitation of the Speaker of our Lok Sabha is bound to stimulate study of these institutions and their possibilities.

The European Parliament representing the ten-member countries of the European Economic Community, has 400 members who are directly elected and sit in different trans-national political groups cutting across national affiliations.

They are organised into seven such groups—Socialists, Christian Democrats, European Democrats, the Liberal and Democratic group, the Communist and allied group, European Progressive Democrats and independents—representing different cross-sections of European opinion.

The European Parliament which functions from Strasbourg has only an advisory role and is entrusted with the responsibility of supervising the work of the European commission and its council of ministers and commenting on community legislation. It is a unique institution which, even without any supranational powers, has come to exercise great moral authority in the shaping of the European community and supervising its actions.

The members of the delegation are drawn from Britain, France, West Germany, the Netherlands, Belgium and Ireland.

Suffocation of Law:—It may be gratifying to men of the law that more things have been written about law than of other things. It has been observed: "In the garden or forest of jurisprudence there are many fruits. Law is divine. Law is natural. Law is custom. Law is contract. Law is a command of the human sovereign. Law is a social fact. Law is a union of primary and secondary rules. Law is prediction. Law is experience. Law is an unrealisable ideal. Law is a practical and realisable compromise. Law is a balance of social and individual interest. Law is mora-

lity. Law is what the Judges say from the Bench. Law is a tradition. 'The law' is different from 'Laws'. (Mukharji, The New Jurisprudence, page 44). Law is thus multi-faced, multi-dimensional and bearing many burdens of human life in action. Jurisprudential aspect apart, law is essentially a social science. In the world of today, right from the first breath of life which has to be recorded, to the last whimper of death which has got to be certified, there is practically no portion of our existence that goes unaffected or untouched by some law or other, Humbert Wolfe wrote in a cynical vein when he remarked:

"Making innumerable statutes, men

Merely confuse what God achieved in ten".

Mr. Khanna (formerly Judge of the Supreme Court) points out that the number of laws which are being enacted every year is so large that it baffles even men of law. He mentions how an Australian Judge after referring to the threat posed to citizens of being trapped by a vast network of laws observed "I look forward to the year 2000 ...... when the individual will be so encased and enmeshed by legislation that he will feel like a little larva in a cocoon and will be able to do nothing". There is a poem "Too Many Laws" where the poet seems to have found his mettle:

Give me the land where no laws abide.

Where love is the law that can never divide.

The odds are many and hopes are few.

For that lawless heaven to swing into view.

Expanding horizon of Law:—We have today a proliferation of laws which is staggering in its quality and fineness. There is no field of human activity which does not in one way or the other come into contact with law. The primary function of law is to settle disputes and to maintain law and order. It is also true that another important function of the law is to keep surveillance of official action. Legal systems in the modern age also enact and administer a variety of programmes like welfare programmes, defence programmes, business programmes and many other programmes none of which can be identified as settling disputes between parties. In the process of assuming such functions law has spread its tentacles so wide that whether we like it or not we cannot escape law at any point of our existence. Each new scientific discovery brings in its wake new laws. As has been remarked, throughout all the stages of development of mankind science soars like an eagle while law drags on like a turtle, but nevertheless is always there. Science and technology have projected visions of colossal power, but unless such power is tamed and subjected to discipline in the form of law mankind will, all the time, be facing extinction in the hands of science and technology. Mr. Khanna has focussed attention on this aspect in his book "Law, Men of Law and Education". He points out that the magnitude of the latest innovations of science and technology in the field, for instance, of biology is quite stunning. Penetration of the mysteries of human heredity has led to the adoption of new techniques like *amniocentesis* for gaining information about a genetic make-up of a foetus in the mother's womb. Cloning in vitro fertilisation and embryo transplantation are other examples. Mr. Khanna observes that these developments would lift human heredity out of the realm of fate or chance into the realm of free will and choice. No longer, can blame or credit be apportioned to Nature for the genetic inheritance one passes on to one's descendants; the responsibility will be more and more that of the authors. It is no doubt a moot question whether these developments will be used to produce better and wiser people or for other ulterior purposes. Also various legal problems are likely to erupt, such as whether life begins with a successful vitro fertilisation before implantation in the uterus, whether the pre-implantation fertilisation could be regarded as conception, whether abandonment of the fertilised ovum without implantation would be tantamount to abortion in the eye of law and who would be regarded as the parents of the child as a result of vitrus fertilisation and embryo transplantation (See page 87). Again advances in medical research reveal that a person is truly dead when the brain ceases to function and not when the heart or other organs stop working.. Mr. Khanna indicates that this may necessitate the formulation of a precise legal rule as to the time of death (page 95).

Recent trends in judicial thought processes.—There is a feeling that the Supreme Court

has created a sort of "due process" though the doctrine had been firmly rejected in the *A. K. Gopalan's case*[1]. *Maneka Gandhi's case*[2], hailed as marking "the resurgence of the human rights conscience of the Court" and other decisions[3] lend colour to such an inference. Again in the post-emergency Court, as remarked by Mr. Khanna, Justice Krishna Iyer seems to have adopted, as it were, a new posture. It is said that in *Inderjeet Gupta* v. *State of Uttar Pradesh*[4] in declaring that policy is a matter for Parliament and constitutionality a matter for the Court, he manifested a posture of a policy-maker. In *Ram Prasad Saha* v. *State of Bihar*[5], the learned Judge, threw out the suggestion that the State should enact legislation on the plight of children. In *Mrs. S. Sawhney* v. *Mrs. K. Sawhney*[6], the learned Judge required Parliament to clarify and spell out the intendment of a legislation. In *Municipal Council, Ratlam* v. *Shri Vardhichand*[7], the learned Judge sketched out an extensive policy of affirmative action schemes concerning sanitation and rickshaw-pullers. It may also be recalled that in earlier decisions like *State of Kerala* v. *Thomas*[8], he had indicated the type of policy he would like to be pursued and in *Bangalore Water Supply Ltd.* v. *Rayappa*[9], a sort of policy decision was rendered by him extending the scope of industrial legislation to a very large area. In *Commissioner of Income-tax* v. *B. N. Bhattacharjee*[10], the learned Judge, in construing the word "assessee" in section 245-M (7) of the Income-tax Act as including all parties affected by the subject-matter of the assessment, said: "We are mindful that a strict grammatical construction is departed from in the process and a mild legislative flavour is imparted by this interpretation. The judicial process does not stand helpless with folded hands but engineers its way to discern meaning when a new construction with a view to rationalisation is needed".

This role of the learned Judge as a policy-maker came in for criticism in his own Court in *Manohar* v. *Marotrao*[11]. In the matter of abolition of capital punishment he was criticised by Justice Sen, as indulging in policy-making[12].

Another thing about the approach of the learned Judges of the Supreme Court is that ideological tensions among Judges seem to have surfaced sometimes. Justice Tulzapurkar was critical of the language and style, evidently, of Justice Krishna Iyer though his name was not specifically mentioned[13]. Justice Krishna Iyer replied presumably to this criticism in *Oregano Chemicals Ltd.* v. *Union*[14], though here again the name of the Judge was not mentioned. In In re *Mulgonkar*[15], a case relating to an alleged contempt of Court, Justice Kailasam suggested ignoring Krishna Iyer's judgment as it had only the value of an *obiter*. These lend colour to an impression of some infighting even among Judges.

In regard to Justice Krishna Iyer's interpretation, in the *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sangh*[16], of the term "tribunal" in section 11-A of the Industrial Disputes Act as comprehending an arbitrator which has a definition in the Act, which cannot be extended, Mr. Hidayatullah (former Chief Justice of India) in his Foreword to the Law of Industrial Disputes, 3rd edition by Malhotra, at page viii, remarks: "Yet the Court has found a *casus omissus*, where none exists. It is really a case of *leges scribo*".

Two recent judicial observations would suggest that the Courts would not hesitate to comment on policy implementation by the Government. During the hearing of an application for initiating contempt of Court

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1. (1960) S.C.C. 88.
2. *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597 (deprivation of pass-port).
3. *Charles Sobhraj* v. *Superintendent, Tihar Jail*, A.I.R. 1978 S.C. 117; *Hoskot* v. *Delhi Administration*, A.I.R. 1978 S.C. 1548; *Sunil Batra* v. *Delhi Administration*, A.I.R. 1978 S.C. 1675; *Hussainara Khatoon* v. *State of Bihar*, A.I.R. 1979 S.C. 1360, 1369, 1377, 1819.
4. (1979) 4 S.C.C. 246, 297.
5. (1980) 1 S.C.C 74.
6. (1980) 1 S.C.C 63.
7. (Special Leave Petition No. 2856 of 1979).
8. A.I.R. 1976 S.C. 470.
9. A.I.R. 1978 S.C. 543.
10. (1969) 2 S.C.J. 461, 474, 475.
11. A.I.R. 1978 S.C. 1084.
12. A.I.R. 19 9 S.C. 9 6.
13. A.I.R. 1978 S.C. 1084.
14. (1979) 1 S.C.C. 573.
15. A.I.R. 1978 S.C. 737.
16. (1980) 1 L.L.J. 137.

proceedings against the concerned officers of the Tamil Nadu Government in respect of certain acts alleged to be done by them in relation to certain interim orders of the Court the Chief Justice of India is reported to have remarked that the manner of implementation of Prohibition Policy—which forms part of Directive Principles under the Constitution—appeared to hoodwink the people. The Chief Minister says that the Government's policy is to promote Prohibition and at he same time he says liquor permits will be given to boys and girls above 21 years.

"What a way to hoodwink people".

It was a "shame" the way the policy was being enforced.

When counsel for the State submitted that Prohibition as such was not an issue before the Court, Mr. Justice Chandrachud said it concerned the Directive Principles of the State Policy and that was the reason he was making these observations[17].

In another matter delivering his judgment on a petition filed by Mr. Vimal Chand Godha, a merchant, challenging the mini-draws conducted by the Rajasthan Lottery Department, Mr. Justice Lodha observed that he was compelled to say that lottery was nothing but gambling. It did not behove well for a welfare state to indulge in a "vicious activity of gambling for augmenting revenue only".

Mr. Justice Lodha regretted that "scrapping of prohibition and encouraging State lotteries show a mad race and craze for augmenting revenue at the cost of morality which should be a matter of concern to those legislators who believe in morals".

He warned that a stage would come when the State might be tempted to consider entering the arena of flesh trade.

He held that though the Courts jurisdiction was only statutory, the Constitutional mandate of a welfare state and the preamble of a socialist state certainly required it to point out the fact to the legislators so that they could say "here and no further"[18].

Crime on the increase.—It is hardly disputed that crimes and crimes of violence in particular are on the increase. It is particularly disturbing that many educated youngmen are getting involved. Partly due to the craving for excitement, partly due to unemployment and the lure of gold which is now available at soaring prices only young persons are being increasingly sucked into the orbit of desperadoes and law breakers. The phenomenon seems to be global. The position in the United States of America has been set out as follows: A violent crime is committed in the United States every 24 seconds, with a murder taking place every 23 minutes and a rape every six minutes, according to the U. S. Department of Justice.

The department reported that the U.S. crime rate rose by another seven per cent. last year, making an overall 10 year increase of 55 per cent. Documented murders totalled 23,044, the victims most commonly being men between the ages of 20 and 29, it said.

The Federal Bureau of investigation (FBI)'s index of serious crime rose by nine per cent. the department added.

The violent crimes of murder rape, robbery and aggravated assault increased 11 per cent. during 1980.

Rape increased eight per cent. robbery 10 per cent. and aggravated assault seven per cent. Burglary was up by 14 per cent. larceny-theft eight per cent. and motor vehicle theft two per cent.

An estimated 71 out of every 100,000 women were reported rape victims for 1980.

There were nearly four million burglaries last year, more than seven million larceny thefts and more than one million motor vehicle thefts.

There were 57,947 reported assaults on law enforcement officials.

Proposed amendment to the Hindu Marriage Act.—Provision for dissolution of marriage on the ground of its irretrievable break-down is to be added to the grounds for divorce already available under the Act. In introducing divorce into Hindu law the Hindu Marriage Act, 1955 had adopted two principles, namely that the right to apply for divorce was the right of the innocent party and secondly, the conduct of the latter or a wrong committed by such person would be a bar to grant of relief to the petitioner. Divorce

17. The Hindu, Madras, 2-12-81.
18. The Mail, Madras, 4-12-81.

under the Act as at present reflects mainly three categories of grounds. The first is the traditional theory of matrimonial fault. The second is the theory of frustration by reason of specified circumstances. The third is the theory of mutual consent on the part of the spouses. There is to be found in the present provisions no theory of the break-down of the marriage as a basis for dissolution except to the very restricted extent available under section 13 (*i*-A). As to the theory of break-down of marriage as a ground for grant of dissolution it was observed in *Parihar* v. *Parihar*"[19]. A marriage in which the parties could no more live together deserved to be dissolved. But there is no provision in the Act that a marriage which has irretrievably broken down should be dissolved". It was realised that restricting divorce to cases of the fault of one of the parties may cause much distress particularly where the situation is such that although none of the parties was actually at fault or the fault is of such a nature that the parties to the marriage do not wish to reveal it, yet there has developed a situation where marital relationship has lost its worth and become more of a burden. In *Shanti Nigam's case*[20], the wife stated that she entered matrimony "with hopes of happiness" but was left with the feeling in her mind of "a lack of romantic exuberance and joy". Often "what started out with such promise to be a thing of beauty and joy for ever has become an ugly thing of torture and potential agony for ever", and the parties believed that the only way out of the impasse was either death or divorce. The Law Commission has observed: "a petition for divorce on the ground of irretrievable break-down of marriage would not make it necessary for the Court to go into the question as to which party was at fault, before granting a decree for divorce, and it would be enough to prove that the relations between husband and wife have reached such a breaking-point that there is no possibility of reconciliation. The Law Commission also suggested that if the spouses for a continuous period of three years before the presentation of a petition for dissolution have been living apart, it should give rise to a presumption of the break-down of the marriage. The English law of divorce requires continuous living apart for a period of five years to show a break-down of the marriage.

The theory of marriage being, a samskara, an indissoluble union between the spouses having been jettisoned, when once Hindu law has lost its moorings in religion, when once marriage has come to be regarded as a contract between the parties, the minimum age of marriage having been raised to 21 years and 18 years for the bridegroom and the bride, when once performance of ceremonies is no longer obligatory to impart sanctity to a marriage, leaving custom to rule the roost practically, when once modern concepts of marriage in the west hold a glamour to persons with western orientation or had been imparted western education, when once economic pressures and social conditions make it necessary in quite a number of cases for both husband and wife to earn and the woman is no longer a stay-at-home, the marital tie is apt to sit not heavily; divorce based on irretrievable break-down of marriage becomes inevitable reinforced in many cases, by the absolutely indefensible and wholly callous attitude of the husband towards his wife.

Conclusion.—A cartoonist quipped: "Those days, one whole year we had to wait to thank God the year is over". How true it is in regard to the expiring year without much to cheer. Every passing year seems no better. With a sense of relief one awaits the advent of the New Year. It has been said:

"Who would have known?
From the sacrifice of youth dedicated to the future
Only the vermin of corruption come forth.
Who would have known?
In debrisstrewn fields that one promised re-birth
Only plants of venom and thorn are burgeoning.
The vermin will soon spread their golden wings
And the wind passing over the grasses will spread pestilence."

Hope however never dies. And so, on to the New Year with a bright smile and calm determination.

19. A.I.R. 1972 Raj. 140.
20. 1970 All. L.J. 67.

A NOTE ON CHANDRASEKARAN v. KUNJU VANNIAR AND OTHERS, (1975) 88 L. W. 216: (1976) 2 M.L.J. 243: A.I.R. 1975 Mad. 227 (F.B.).

By

R. Govindarajan, B.A., B.L., *Advocate.*

The above case has considered whether a tenant inducted by a mortgagee is entitled to the protection of the Tamil Nadu Cultivating Tenants' Protection Act and laid down that such a cultivating tenant is entitled to the protection of the Act and he cannot be evicted by the mortgagor on redemption of the property and that he can have only khas possession. The learned Judges rest their view only on the construction of the definition of 'cultivating tenant' as laid down under the Tamil Nadu Cultivating Tenants' Protection Act. The learned Judges did not consider the effect of the said Act on the provisions of section 76 of the Transfer of Property Act. The Tamil Nadu Cultivating Tenants' Protection Act, has no doubt made some inroads into the general provisions of the Transfer of Property Act, but has not fully abrogated the provisions of the Transfer of Property Act, so far as the rights and liabilities of the mortgagor and mortgagee *inter se* are concerned. The learned Judges have also not taken into consideration the principles laid down by the Supreme Court in some of the earlier judgments.

I shall refer to some of the Supreme Court judgments wherein they have considered the provisions of the Transfer of Property Act, and its effect on Special enactments of various States which give protection to Cultivating Tenants. The earliest case to come before the Supreme Court was: *Mahabir Gope* v. *Harbans Narain*[1], which held as follows: The general rule is that no man can confer a better title on another than he himself has. A mortgagee cannot therefore create an interest in the mortgaged property beyond the period of termination of his interest. The mortgagee who takes possession of the mortgaged property must manage as a person of ordinary prudence would manage as if it were his own and he must not commit any act which is permanently injurious to the property as per section 76 (*a*) and (*e*) of the Transfer of Property Act. Hence, a mortgagee cannot grant a lease beyond the period of mortgage and it comes to an end on redemption. A mortgagee, during the continuance of the mortgage, cannot act in a manner prejudicial to the interest of the mortgagor by leasing the property which may enable a lessee to get permanent occupancy in the land thereby defeating the mortgagor's right to get khas possession. It would be a case which would fall within the proviso to section 76 (*e*) of the Transfer of Property Act. A permissible settlement by a mortgagee in possession with the tenant in the course of prudent management and the springing up of rights of the tenants are exceptions to the rule. This exception will not apply to cases where the deed prohibits such things. But the settlement with a tenant must be a "*bona fide* one".

Another case which came before the Supreme Court in *Harihar Prasad Singh* v. *Deonarain Prasad*[2], affirmed the principle, stated above and held that the tenants inducted by the mortgagee cannot claim occupancy rights over the lands under the Bihar Tenancy Act. In *Asaram* v. *Ramakali*[3], the Supreme Court while following the earlier decision, went further and said that the condition precedent to have the rights under the statute must be one which is legally binding on the mortgagor. Where however a person who purports to grant the lease has no authority to do so he cannot confer any right. Whatever the rights *inter se* between the lessor and the lessee, as against the true owner, the latter does not in law, acquire the status of a tenant. Thus if *A* is the owner and *B*, a trespasser in possession, grants a lease to "*C*" then "*C*" will not get any rights. Thus the crucial question will be whether the person who claims as a tenant was admitted by a person who has the right to do so. An owner will of course be entitled to admit a tenant and a mortgagee in possession would have a right to do so either if he is authorised in that behalf by the deed of mortgage or if the transaction is one which is protected under section 76 (*e*) of the Trans-

1. 1952 S.C.J. 292: 1952 S.C.R. 775: A.I.R. 1952 S.C. 205.

2. 1956 S.C.J. 279: 1956 S. C. R. 1: A.I.R. 1956 S.C. 305.

3. 1958 S.C.J. 575: 1958 S.C.R. 586: (1958) 2 M. L. J. (S.C.) 32: (1958) 2 An.W.R. (S.C.) 32: A.I.R. 1958 S.C. 183.

fer of Property Act. But where the transaction is not one which could be upheld under section 76 (*b*), then there is no admission of tenant by any person having authority to do so and such a transaction though valid as between the mortgagee and the lessee cannot form the foundation on which any rights under the Act could be based". In *Arabu* v. *Ramdeo*[4], the Supreme Court while accepting the principles laid above held that the tenancy was a *bona fide* one and that the tenant was cultivating the lands even before the Rajasthan Act, came into force. The two other cases in 1970 S. C. R. 581 and *Sachalmal Parasram* v. *Mst. Ratanbai*[5], dealt with the tenants inducted in urban property by a mortgagee and they held following the cases mentioned that the tenant cannot claim the protection as the relationship of landlord and tenant terminated after the termination of the mortgage as the same does not run with the land.

Bearing in mind the above principles of law we have to examine the soundness of the full bench decision delivered by Veerasami, CJ. The learned Chief Justice looked at the definition part of the cultivating tenant and took the view that "the agrement is the *sine qua non* to bring about a tenancy" and that he should carry on personal cultivation as defined and because of the inclusive definition of the term cultivating tenant, if he continues in possession after the determination of the tenancy agreement, he becomes a statutory tenant. The definition under the Act is as follows:—

"*Cultivating Tenant*" means a person who contributes his own physical labour or that of any member of his family in the cultivating of any land *belonging to another* under a tenancy agreement express or implied and includes a person who continues in possession of the land after the determination of the tenancy agreement etc: The learned Chief Justice has overlooked the fact, that the land must belong to another. That means the land should belong to a person who is the lawful owner of the same. The definition does not envisage a person who has a limited interest in the land; hence a mortgagee is not envisaged under the definition even though the tenancy agreement is a *sine qua non* for the tenant and that it should be with the real owner. When this definition is read with the definition of "landlord" it can only mean the real owner who is entitled to evict the tenant and not any other person. While so the learned Chief Justice states as follows: "Reading the definition of "Cultivating Tenant" and "Landlord" it is further clear that in order to be a cultivating tenant for the extended period the lessor need not necessarily have the capacity or right to confer it. All that is essential for the inclusive definition to apply is that in its origin the tenancy should have resulted from a tenancy agreement express or implied and for the purpose of the inclusive definition it does not matter whether the original lessor is in the picture or not. The test to find out whether a person is a landlord or not or whether there is a direct agreement between them and the tenant, is *whether the person who claims to be the landlord is entitled to evict the tenant on the grounds mentioned in the Act*. If that is the reasoning even a tenant claiming tenancy agreement with a trespasser is entitled to continue in possession and claim the benefits of the protection under the Act. Such an illegal and unlawful claim has to be recognized by the Courts, which is not the object and intention of the legislature. The entire reasoning of the learned Chief Justice is based only on the definition section alone without considering the provision of the Transfer of Property Act, as has been done by the learned Judges of the Supreme Court. The learned Judges of the FullBench ought to have considered the effect of the inroads made by the Special enactment into the Transfer of Property Act, and ought to have followed the principles of law enunciated by the Supreme Court.

Therefore I submit that the decision of the Full Bench is not sound and the question requires fuller consideration. Otherwise, this decision will cause great hardship to persons in the enjoyment of property.

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4. (1967) 1 S.C.J. 60: (1966) 3 S.C.R. 676: A.I.R. 1966 S.C. 1721.
5. (1973) 3 S.C.C. 198: 1972 M.P.L.J. 427: A.I.R. 1972 S.C. 637.

KUDIYIRUPPU ACT—VESTING OF OWNERSHIP OF HOUSE.

By

G. Ramamurthi, B.SC., B.L., *Advocate, Mannargudi.*

The decision in *K. Visalakshi* v. *Maruthamuthu Pillai*[1], holding that a tenant living in the house of the landowner would become owner of the building also, on a construction of section 3 (2) of the Tamil Nadu Kudiyiruppu (Conferment of Ownership) Act (XL of 1971) seems to have been rendered without some of the earlier decisions of the Madras High Court being referred to before the learned Judge.

The Tamil Nadu Occupants of Kudiyiruppu (Protection from Eviction) Act (XXXVIII of 1961) was assented to on 10th November, 1961. The Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act (XL of 1971) was assented to on 20th December, 1971. In both the Acts, the definition of Kudiyiruppu is word for word similar. In both the Acts "Kudiyiruppu" means *site of* ...." In both the Acts, "Tenant" has been defined as "any person .... for his being allowed to *enjoy the land of the latter* ......" The above definitions clearly postulate that the original lease or licence must be of the *land* only and the buildings must have come into being later on. In other words, at the time of grant of lease or license to the tenant or licencee, only the site should have existed and not any building on the site. This gains support from the decision of N. S. Ramaswamy, J., reported in *Ganesan* v. *Madurai Achari*[2], where at p. 442 he states "........ I am quite clear that even under the Kudiyiruppu Ownership Act, whether *the site* is a kudiyiruppu or not is within the jurisdiction of civil Court......" and again at page 443 "...... The presumption would arise only if the *site* is a kudiyiruppu". The decision of Suryamurthy, J., in *T. K. Narayana Pillai* v. *Naganatha Iyer*[3], clarifies the position without doubt: "The lease or license to enjoy should have been *only in respect of the site*" and again. "...... The definition does not apply to pucca buildings which any agriculturist might take on lease ....".

Even section 3 (2) proceeds "...... where in the case of an occupant of a kudiyiruppu ...." clearly meaning that the claimant should have been inducted into possession of a site only. In fact section 3 (2) starts by saying "...... in whom such kudiyiruppu vests under section 1". Hence section 3 (2) comes into operation only if section 3 (1) is applicable. Under section 3 (1) the vesting is of site only provided that the original lease or licence was of site only. Reading sections 3 (1) and 3 (2) together it is clear that the original lease must be of site and the building should have been constructed later on, either by the tenant or the owner or any third party. If the original lease was of the house itself, then section 3 (1) cannot have any application and section 3 (2) cannot come into the picture since it is subject to section 3 (1).

Already there is Buildings Lease and Rent Control Act. Suppose an agriculturist is let in as tenant of a building in a municipal town, then, as per the above decision he becomes owner of that building itself. The legislators would never have intended the same.

One more aspect is that under section 3-B it is only the Authorised Officer who can decide upon this issue and neither the lower Courts nor the High Court sitting in second appeal can decide on this aspect. Attention does not seem to have been drawn to the decisions of N. S. Ramaswamy, J., in *Ganesan* v. *K. Madurai Achari*[4] and *Ganesan* v. *Madurai Achari*[5], wherein he has indicated that in such cases, the civil Court ought to decree the suit subject to the decision of the Authorised Officer.

The decision under comment seems to require further consideration.

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1. (1981) 2 M.L.J. 293.
2. (1977) T.L.N.J. 437: 91 L.W. 6.
3. (1981) 1 M.L.J. (N.R.C.) 15.
4. 91 L.W. 6: 1977 T.L.N.J. 437.
5. (1979) 92 L.W. 91.

AMENDMENT OF PLEADINGS UNDER ORDER 6, RULE 17, CIVIL PROCEDURE CODE.

By
R. GOVINDARAJAN, B.A., B.L., *Advocate, Madurai.*

The cardinal principles regarding amendment of pleadings have been laid down by judicial precedents as follows: (1) The amendment could be done at any stage of the suit, *i.e.*, even at the appellate stage before the Supreme Court; (2) If the amendment is necessary in the interests of justice to get an adjudication on all the issues in controversy or to avoid multiplicity of proceedings, it should be granted provided it does not change the fundamental character of the suit. (3) It is in the discretion of the Court to allow or not to allow an amendment of the pleadings the discretion should be exercised in a sound and judicial manner and the same should not result in an improper refusal.

The Courts have been very liberal in interpreting Order 6, rule 17, Civil Procedure Code, and always leaned towards allowing amendments. The Supreme Court has even gone to the extent of allowing amendments of pleadings even though a new case had been put up. In *M/s. Ganesh Trading Co.* v. *Moji Ram*[1], Beg, CJ., observed: "the provision for the amendment of pleadings subject to such terms as to costs and giving to all parties concerned necessary opportunity to meet exact situations resulting from any amendment, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcomings can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience and expense caused to the other side from its omission. Even very defective pleadings could be cured so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional court-fees which may be payable or of costs to the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that Courts should ordinarily refuse prayers for amendment of pleadings."

1. (1978) 2 S.C.C. 91: (1978) 2 S.C.R. 614: A.I.R. 1978 S.C. 484.

One eminent Judge of the Madras High Court has already opined that payment of costs is a panacea for all troubles. In another case reported in *Iswardas* v. *State of Madhya Pradesh*[2], Chinnappa Reddi, J., has stated "there is no impediment or bar against an appellate Court permitting amendment of pleadings so as to enable a party to raise a new plea, provided the appellate Court observes the well-known principles subject to which amendments of pleadings are allowed. There should be a reasonable explanation for the delay in making application seeking such amendment and, if made at the appellate stage, the reason why it was not sought at the trial Court. If the necessary material on which the pleadings arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But there is no prohibition for the appellate Court permitting amendment at the appellate stage merely because the necessary material is not already before Court". The Madras view is also properly laid down in *Md. Salih Sahib* v. *T. C. Adam Sahib*[3], Balasubrahmanyan, J., has observed: "amendment of pleadings cannot be turned down by Courts merely on the score that they introduce an inconsistent plea or a new cause of action. The true test is whether the amendment is foreign to the subject-matter of the suit if not whether it would be in the interests of justice to grant it". This case dealt with an amendment for alternate relief.

In this state of law, the case reported in *Gopi Pillai* v. *Dr. Swamy*[4], has laid down a different view. Sathiadev, J., has refused amendment of pleadings for an alternate relief since the application was made in the trial Court after the examination of witnesses were over on the plaintiff's side. The learned Judge without adverting to the dicta of the Supreme Court, has come to a conclusion that the plaintiff wanted to protract the proceedings and that Courts should not act to the whims and fancies of the plaintiff. I would respectfully submit that the said view is debatable and ignores the established legal dicta holding the view for several decades past.

2. (1979) 4 S.C.C. 163: (1979) 1 S.C.J. 522: A.I.R. 1979 S.C. 551.
3. (1977) 2 M.L.J. 111: 90 L.W. 435: A.I.R. 1977 Mad. 368.
4. (1980) 93 L.W. 17.

PROBLEM OF SPEEDY DISPOSAL OF MATTERS COMING BEFORE THE SUPREME COURT AND THE HIGH COURT.*

The Tenth Law Commission proposes to embark upon the study of the problem of evolving a methodolgy for speedier disposal of matters coming before the Supreme Court and the High Courts.

With a view to eliciting opinion of a cross-section of the informed society, a questionnaire has been prepared. As your journal reaches practically the entire lawyer population of the country, it is expected that the Commission will be benefited by the views of the legal profession on this subject of contemporary interest.

The background notes appearing below each of the questions do not represent the views of the Commission and have been appended so as to raise issues and promote discussion. Unless advised to the contrary the Commission will assume that the comments received on the questionnaire are not confidential and that the commentators agree in the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any clearly expressed desire for anonymity will be respected.

Considering the contemporary nature of the subject, I shall be grateful if comments are received by the Commission as early as possible, say, by 1st March, 1982, so that the Commission would be in a position to commence an in-depth study of the problem.

QUESTIONNAIRE

1. (*a*) Should the Supreme Court be replaced by a constitutional Court dealing exclusively with constitutional matters?

(*b*) Should such a Court invariably sit en banc (as against in Benches as is the present practice)?

(*c*) What should be the qualifications and modalities of appointment as a Judge of that Court?

A federal constitutional Court was established in West Germany in 1951 which has the power to declare statutes unconstitutional as well as to outlaw political parties which seek to impair or abolish a free democratic basic order or which endanger the existence of West Germany. The Court consists of eight Judges in two panels, six out of them being elected by two-thirds majority. The Court has been criticised as being subservient to the Government of the day and if no party enjoys two-third majority, the selection procedure is reduced to a matter of haggling between the political parties: "If you accept our S.P.D. candidate we accept your C.D.U. candidate" (West German Federal Constitutional Court: Political Control Through Judges, Gisbert Brinkmann (1981) Public Law 83 at page 84). The criticism that a single Judge of the Supreme Court can carry some of his colleagues to his way of thinking and the verdict in a case depends upon the composition of a bench would to some extent be diluted if the Court sits en banc in each and every case. Even in U.S.A. leading advocates find it difficult to predict the range of first amendment in view of the change in the personnel of the Court. (Floyd Abrams quoted in Hindustan Times, dated 23rd December, 1981, page 12.)

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2. Are you in favour of the establishment of a Court of an appeal as the final arbiter of disputes of law (other than constitutional law) leaving the Supreme Court to concentrate on only constitutional issues?

Views have been expressed that questions of law (other than constitutional law) and facts should terminate at an intermediate Court of appeal so that the Supreme Court is able to devote its uninterrupted attention to issues of constitutional law affecting the various segments of the variegated populace of this sub-continent.

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*The letter received from Shri V. V. Vaze, Member-Secretary, Law Commission, 730, "A" Wing, Shastri Bhavan, New Delhi 110001, dated 8th January, 1982, in this connection and the questionnaire are herewith published.

3. Should the Supreme Court only take up that much work which it can dispose of within three months?

The United States Supreme Court receives about 5,000 cases per year and selects only 200 out of the total filing as being fit for hearing. At least 4 out of 9 justices must vote to hear a case. In England during 1970s the average number of appeals heard annually by the House of Lords has been only 33 so that the Judges could devote greater time to matters of public importance.

4. Do you feel that the Supreme Court is acting as a third chamber?

The judiciary appears to have been divided into two classes: the activists who believe that if the legislative text is too bald to be self-acting the Judges must make the provisions viable by evolution of supplementary principles even if it may appear to possess the flavour of law-making (*Rajendra Prasad* v. *State of U.P.*[1]). The other school of strict constructionalists does not countenance reading into a statute conditions which are not to be found therein by process of construction. *Gurbaksh Singh Sibba* v. *State of Punjab*[2]. The latter school *abhors* the theory of judicial legislation even though on facts of a particular case the Court is satisfied that the existing law requires an urgent reappraisal. *Techno-Impex* v. *Gebr. Vane Weeldt*[3]. Some legal writers feel that the Court speculates and pontificates about society and economics mostly from non-evidence, without staff investigation, opinions of experts on law enforcements, industry and in general without the tools necessary for legislative work.

5. Have the judgments of the Supreme Court regarding compensations payable upon the abolition of feudal rights brought to nought the process of social reform?

One of the Judges of the Supreme Court expressed his view that the legislation relating to abolition of the zamindari system met its Waterloo at the hands of the judiciary and the benefits of independence have not percolated to the masses. Even in New Zealand, views are being expressed that the decision of the House of Lords in *R.* v. *Sang*[4] concerning judicial discretion to exclude evidence on the ground that it was illegally or unfairly obtained has been criticised as being not based on the social conditions prevailing in New Zealand. Justice Black of the U. S. Supreme Court disfavoured Courts assuming roles such as running school systems and making decisions about racial proportion of faculty members for which they are not trained. Justice Stuart was also of the view that Courts should not be in the business of creating new rights. Justice Black accused his colleagues of allowing the Court to turn professional criminals loose to prey upon society with impunity and a theory is gaining ground that the Court has no business forcing its views on the State because it lacks accountability and is not the voice and conscience of contemporay society.

6. Are Courts grasping at jurisdiction in matters which lie squarely within the competence of the executive branch of Government?

At the instance of a Congresswoman Elizabeth Holtzman a District Court in New York had issued an injunction in July,1973 halting the bombing of Cambodia but the injunction was vacated immediately so that not a single bombing schedule was upset. (The Brethren—Inside the Supreme Court —Bob Woodward and Scott Armstrong— for short 'Brethren' p.277—278.) Opinions have been expressed that if the Supreme Court had not entertained the challenge to the Bearer Bond Scheme, Government could have raised resources to the tune of Rs. 1,000 crores. In New Zealand fast track legislation like the Nationl Development Act, 1979, limits judicial challenges to works of national importance. The judgment of the Supreme Court stalling the attempt of the Maharashtra Government to clear up footpaths in the city, of unauthorised dwellers has evoked a comment from a former Judge: "Under what law are the trespassers entitled to alternative

1. A.I.R. 1979 S.C. 916, 924.
2. (1980) 2 S.C.C. 565.
3. (1981) 2 W.L.R. 821 at 842.
4. (1979) 2 All E.R. 1222.

accommodation? What Judges will do if trespassers set up shanties in the spacious lawns of the Court or their houses"?

7. Should appointees to judgeships of Supreme Court and High Courts have a political background?

Earl Warren was a former crusading prosecutor, three-term Governor of California and Republican Vice-Presidential nominee with the result that when he was appointed as Chief Justice of the Supreme Court of the United States of America, some felt that he had a greater impact on the country than even some Presidents. In Italy a constitutional Court which had come into existence in 1955 consists of 15 members, one-third of whom are nominated for 12 year term by the Head of the State, one-third by the legislature and one-third by the judiciary.

8. Is the criticism that persons of humble origin or low economic status are not likely to be appointed as High Court Judges in India justified?

The English judiciary is criticised as being inevitably out of sympathy with modern social tendencies and has long failed to have any understanding of the working conditions, attitudes and aspirations of the mass of the population. Most of the English Judges of High Court and Appeal Court had received public school education followed by legal studies at Oxbridge and then called for the Bar. (K. Eddey's English Legal System, 2nd Ed. 1977.) In India the Chief Justices are criticised for recommending lawyers belonging to a particular caste or group for judgeship.

9. Will it be correct to say that the Judges of the Supreme Court and the High Courts are not commanding that prestige which they used to command in the past only because their salaries are very much lower than the earnings of leading advocates?

From time to time successive Law Ministers have ruefully lamented about the unwillingness of the leading advocates to accept judgeships because of the poor financial benefits. Even in the United States of America the salaries of Supreme Court Judges are very much lower than the emoluments of leading lawyers and Justice Fortes had to suffer 90 per cent. cut in his emoluments when he was appointed a Judge of the Supreme Court. [The Brethren-page 20]. The Chief Justice of the United States gets a salary of $ 92,400 while the Associate Judges get. $ 88,700 per annum. Sometimes the Chief Justices of the State Supreme Courts were getting salaries more than that of the Chief Justice of the United States. Some bright boys fresh out of a law school were starting at $. 40,000 a year while law firm partners in the age group 49-51 were making $ 194,600 on the basis of 90th percentile. From amongst the federal Judges who get a salary of about $. 57,500, 7 had resigned in the 1950s while the number of resignations has risen to 24 during the past decade. Because of the poor economic compensation 56 of the Federal Judges are continuing to work full-time even though they became entitled to retire as long back as in June, 1960.

10. Is much of the delay in the Courts occasioned by lawyers seeking adjournments on flimsy grounds?

One of the Judges of the Supreme Court felt that certain bar associations behave like trade unions and resent refusal of adjournments to counsel resulting in unnecessary delay. Chief Justice of a High Court also referred to accommodation sought by leading lawyers disturbing the Court calendar.

11. Should the Supreme Court evolve its own procedure in criminal cases?

Commenting on the unusual procedure followed by the Supreme Court in putting Court questions to an accused in a murder case, a legal journal observed that a Court or tribunal should not evolve its own procedure in each case according to its opinion about the circumstances of the case and lay down a precedent which is not warranted by the Court of Criminal Procedure. (1980-81) 85 C.W.N. (Editorial Notes) 855

12. Is not much of the time of the Supreme Court and High Courts taken up by constitutional writs which ultimately are dismissed?.

On an average not more tnan 5 per cent. of the writ petitions filed in Indian Courts ultimately succeed while in West German constitutional Courts the percentage is as low as 1. 18.

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13. Presently the judicial system is based on the Anglo-Saxon jurisprudence. Should it be replaced by an Indian system of administration of Justice?

The present judicial system has sometimes been characterized as a legacy of British Raj and the prized values of British jurisprudence such as equality before the law, independence of the judiciary and judicial review have been disfavoured.

Some have gone hammer and tongs at the contents of the recent lectures delivered by the American Lawyer Abrams and the English Judge Lord Templeman labelling it as irrelevant to the country and branding the invitation to these lecturers as "fraternising by a handful of judges, advocates and journalists thwarting the emergence of an indigenous Third World legal system". (Hindustan Times 29th December, 1981, page 9.) Even so, no concrete suggestions have been offered spelling out as to what exactly is meant by 'Indianising of the judicial system'.

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14. Do you feel that the High Courts grasp at jurisdictions in matters where the petitioner has not exhausted an equally efficacious remedy provided by the relevant statute?

The principle that a petitioner must exhaust all the equally efficacious statutory alter native remedies not being unduly onerous before coming to a Court is well-settled.

(*Than Singh* v. *Collector of Customs*[5], *British I.S.W. Co.* v. *Jasjit Singh*[6], *K. K. Shrivastava* v. *B.K. Jain*[7].) However, the ambit of the expression 'equally efficacious' has given rise to difficulties of interpretation. [*Malwa Vanaspati & Chemical Co. Ltd., Indore* v. *Union of India*[8], *Meteor Satellite Ltd.* v. *Income-tax Officer, Companies Circle-II, Ahmedabad*[9], *Tapan Kumar Jana* v. *The General Manager, Calcutta Telephones*[10], *Bavaji and Motibhai* v. *Inspector of Central Excise*[11], *Rabindra Nath Mukherjee* v. *S. R. Das*[12], *Ashok Industries* v. *State of Bihar*[13], *Dharan Singh* v. *Bank of India*[14], *K. S. Siddalingaiah* v. *State of Karnataka*[15]. Justice Frankfurter felt that it is imperative that the docket be kept down so that its volume does not preclude wide adjudication. In England the House of Lords has been hearing about 33 appeals per annum; while looking at the pendency in our higher Courts, a criticism is being levelled that they assume role of a knight errant' grasping at jurisdiction by entertaining any case.

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15. Can the judicial process be scientized?

Recent trends in computer technology and work of robots had given rise to the question:

"If we can land on the moon, can we not solve our disputes by technology?" There are attempts to computer-predict appellate decisions by remote psychoanalysis of the panel of judges *i.e.*, by reading the tea leaves in their prior opinions. (Needed: A judicial welcome for technology - Star Wars or State decisions, by Hon. Howard T. Harkey, 79 Federal Rules Decisions 1979, page 209.)

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16. Do you feel that some leading advocates take up most of the Court's working time arguing for interim relief in cases having no merits and thus upset the day's regular fixtures?

In April, 1981, Chief Justice of India sharply pulled up four Senior Advocates for taking over two hours of the working time of a five Judge Bench on a mere application for interim stay which was ultimately refused.

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5. A.I.R. 1964 S.C. 1419.
6. A.I.R. 1964 S.C. 1451.
7. A.I.R. 1977 S.C. 1703.
8. (1980) M.P.L.J. 84.
9. (1980) 121 I.T.R. 311.
10. 1980 Lab.I.C. 508.
11. (1979) 83 C.W.N. 689.
12. 1979 Lab. I.C. 1287.
13. A.I.R. 1979 Pat. 217.
14. 1979 Lab. I.C. 1079.
15. A.I.R. 1979 Karn. 190.

17. Has the practice of 'Bench fixation' by lawyers taken roots in the Supreme Court and the High Courts?

Two of the Judges of the Supreme Court have brought into focus a current practice among the lawyers to ensure that certain cases are listed before a particular Bench and that in collusion with the Registry officials non-urgent matters are given precedence.

18. Are certain advocates being related to sitting Judges earning by way of 'negative practice' inasmuch as they are engaged only to ensure that the matter gets transferred from the Court of a particular Judge? Rule 6 of Chapter II of the Bar Council of India Rules states that an advocate shall not enter appearance or practise before a Court if the Judge is related to him as father, grandfather, son, grandson, uncle, brother, nephew, first cousin, husband, wife, mother, daughter, sister, aunt, niece, father-in-law, mother-in-law, son-in-law, brother-in-law, daughter-in-law, or sister-in-law. It is alleged that clients who do not wish their case to be heard by a particular bench engage one of the listed relatives practising in that Court to file a vakalatnama on their behalf and secure a transfer of the case.

19. Are over-zealous Government departments responsible for increasing the Court's calendars?

When the Inland Revenue pursued an appeal agitating the question whether a teacher who was being paid £ 13 as mileage allowance for driving to meetings outside her hours of duty is liable to pay tax on that allowance, Mr. Justice Walton gave vent to the uncomfortable feeling that the Crown spends so much time and effort persecuting minnows that it is small wonder there is no energy left to pursue the real sharks.

20. Should the Supreme Court encourage public interest litigation?

Dinosaur cases of Bombay pavement dwellers, conditions in women's re-settlement homes in Delhi and Agra flesh trade have evoked mixed reaction. Some have dubbed these cases as political stunts and an attempt by journalists to run the country; while others have commended the Court for taking issues affecting millions of people.

21. Will it facilitate disposal of a greater number of cases if oral arguments are restricted to half an hour each side?

As against the practice in our Higher Courts where counsel address the Court for months together, the United States Supreme Court permits oral arguments for half an hour on either side. An exception was made in desegregation cases where twice the normal time was allowed.

(The Brethren pp. 2, 41.)

22. Will a procedural requirement making it obligatory on counsel to file written briefs cut down the oral arguments?

Fixation of half an hour time for arguments in the American Courts is rendered possible because of their practice of insisting upon briefs (called Brandeis brief). Preparation of briefs will lead to exactitude and narrowing down of matters in controversy as well as afford opportunities for young lawyers to do research. As the briefs would be eventually printed by some law journals, counsel would necessarily have to devote more time at the desk and the practice of reading law reports in Court *in extenso* would disappear.

23. Should some appeals be disposed of without hearing oral arguments?

In the Supreme Court of Iowa, 66 cases were submitted to the Court in 1973 without oral arguments which total increased to 128 in 1974. Even where oral arguments were permitted lawyers were allowed 10 to 15 minutes for arguing each side and an additional five minutes for appellant's rebuttal. (Appellate Congestion in Iowa: Dimensions and Remedies Hon'ble Mark Mc Cormick 25 Drake Law Review 1975-76, p. 133.)

24. Will it not make for better interpretation of statutes if the rule putting an embargo against citing of debates in Parliament as a legitimate aid to construction is abrogated?

The time honoured practice of the English rules of interpretation of statutes that Hansard can never be relied by the Court in construing a statute or for any other purpose

is being challenged in England. Lord Denning thought of a way of overcoming the obstacle by referring to the debates quoted in th works of jurists (*Regina* v. *Local Commissioner, Ex parte Brandford Council*[16]). But this device of looking into a text book containing the quotation from Hansard has been criticised by a writer as 'not edifying'. (Statutory Reform: The Draftsman and the Judge[17]. The Indian Law closely followed the English Law (*Administrator General of Bengal* v. *Premlal Mullick*[18]). But pleas have been made for whittling down the rule. (*State of Mysore* v. *R. V. Bidap*[19]. *Fagu Shaw* v. *State of West Bengal*.[20])But sometimes even speeches of Ministers while piloting a Bill are not looked into. (*Sat Pal & Co.* v. *Lt. Governor of Delhi*.[21] Lord Devlin has cited an 12 instance (*Stafford* v. *D. P. P.*[22]) where had their Lordships looked back at the parliamentary debates in which some of them had themselves participated in their legislative capacity they would have seen that Parliament had not the slightest intention of making a great change in the law. (Lecture delivered at All Souls College, Oxford on 2nd May, 1979 quoted in Devlin: *The Judge* (1979), p. 148.)

25. Should the present practice of plurality and separate judgments be substituted by one of writing—

(*a*) *per curiam* opinion;

(*b*) a single judgment representing the highest common denominator of the bench,

(*c*) one majority and one minority opinion?

The separate opinions delivered by the Supreme Court in *Delhi Laws Act case*[23], covering 370 pages of reports had created confusion about the *ratio decidendi* in the case and even Chief Justice Patanjali Sastri felt that no particular principles were laid down (*Kathi Raning Rawat* v. *Saurashtra*[24]). It was given to Bose, J., to analyse the several situations and indicate how the Judges split on each situation (*Rajnarain Singh* v. *Chairman, Patna Administration Committee*[25]). The plurality decisions regarding death penalty case gave rise to considerable difficulties in the United States of America (*Gregg* v. *Georgia*[1], *Furman* v. *Georgia*[2]), as well as in our Supreme Court (*Rajendra Prasad* v. *State of U.P.*[3]). In the area of obscenity confusion prevails in the U.S.A. as to whether the 'prurient interest" test has been replaced by "Redeeming social value" test (*Roth* v. *United States*[4], *Fanny* v. *Hill*[5], *United States* v. *Morks*, decision of Court of Appeals for Sixth Circuit, quoted in Columbia Law Review, May 1980 at page 777). Lord Denning was also not permitted by the other Law Lords in the Privy Council to publish his dissenting opinion (*In Re: Parliamentary Privilege Act*, 1770[6], Lord Denning, The Family Story 1981, pages 192-194).

26. Will it not make for certainty in Law if the higher Courts write shorter judgments?

As against 243 pages of judgment in a death penalty case by the United States Supreme Court, our Supreme Court has written a 782 pages judgment in *Kesavananda Bharati* v. *State of Kerala*[7]. But in a later case of death penalty (*Gregg* v. *Georgia*[8]), when the United States Supreme Court chose to write *per curiam* opinion it covered hardly two pages of the law reports. Lord Kilbrandon has observed that lack of economy in judgment writing is a notoriously discreditable feature of the English jurisprudence. (*Cossell & Co.* v. *Broome*[9]).

27. Should an appellate Court necessarily write a reasoned judgment—

(*a*) in every case irrespective of its outcome?

(*b*) only when it reverses the verdict of the lower Court?

16. (1979) 1 Q.B. 387.
17. (1981) 30 I.C.L.Q. 141 at 163.
18. (1895) I.L.R. 22 Cal. 788, 799-800.
19. A.I.R. 1973 S.C. 2555.
20. A.I.R. 1974 S.C. 613 at 629.
21. (1979) 4 S.C.C. 232 at 245.
22. (1974) A.C. 878.
23. A.I.R. 1951 S.C. 332.
24. A.I.R. 1952 S.C. 123.

25. A.I.R. 1954 S.C. 569.
1. 428 U.S. 153.
2. 408 U.S. 238.
3. A.I.R. 1979 S.C. 916.
4. 354 U.S. 476.
5. 383 U.S. 413.
6. 1958 A.C. 331.
7. (1973) 4 S.C.C. 225: A.I.R. 1973 S.C. 1461.
8. 428 U.S. 153.
9. (1972) 1 All E. R. 801 (H.L.).

The practice of dismissing criminal appeals *in limine* with one word "dismissed" has been frowned upon by the Supreme Court. (*K. K. Jain* v. *State of Maharashtra*[10], *Sakharam* v. *State of Maharashtra*[11], *Shaik Mohd Ali* v. *State of Maharashtra*[12], *Shankar* v. *Gangubai*[13].) The practice in the United States Supreme Court of passing a four word order 'the judgment is affirmed' has been criticised by Professor Gerald Gunther as being 'irresponsible' and 'lawless'. (*Doe* v. *Commonwealth's Attorney*, The Brethren page 425.)

28. Should not the statute provide for only one appeal?

Considering the congestion in Courts views have been expressed that infallibity is the *raison d'etre* providing for two appeals, a litigant would not be satisfied even if the statute confers upon him the right to file multiple appeals.

29. Should matters involving a point of law of general public importance leap-frog directly to the Supreme Court?

Under the (U.K.) Administration of Justice Act, 1969, appeals leap-frog direct to the House of Lords under certain circumstances. *American Cynamid Co.* v. *Upjohn Co.*[14], a case concerning a petition for revocation of a patent was the first 'leap-frog' appeal heard by the House of Lords. Lord Denning in a recent case of *A.C.T. Construction Ltd.* v. *Customs & Excise Commissioners*[15], was dismayed at the prospect of different tribunals in U.K. giving different rulings as to whether underpinning work which involved construction of additional foundation fell within the oridnary and natural meaning of the word 'maintenance' and wondered what Customs and Excise authorities should do when they are faced with conflicting decisions of various tribunals.

30. Should judicial review, revision or appeal against interlocutory order be abolished?

10 A.I.R. 1973 S.C. 243.
11. (1969) 3 S.C.C. 730.
12. A.I.R. 1973 S.C. 43.
13. A.I.R. 1976 S.C. 2506.
14. (1970) 3 All E.R. 785.
15. (1981) 1 W.L.R. 49 at 54.

Recently, the House of Lords observed that matters reaching them for preliminay decisions do not serve the cause of justice (*Allen* v. *Gulf Oil Ltd.*[16]). In the United States of America, the "final judgment rule" has been evolved to maximise available judicial resources and to avoid piecemeal litigation (*U.S.* v. *Nixon*[17]). The question as to what is an interlocutory order and whether an appeal lies has also given rise to difficulties *Amar Nath* v. *State of Haryana*[18], *Mohan Lal* v. *Prem Chand*[19], *Pranab Kumar* v. *Yusuf Ali*[20], *Inayatullah Rizvi* v. *Rahimatullah*[21].

31. To what extent is the criticism that the Supreme Court is reversing the High Courts in matters falling within latter's discretion justified?

A Judge of the Supreme Court expressed displeasure over the manner in which the Supreme Court interferes in small matters and thus arrogates to itself the jurisdiction of all subordinate Courts and try to do everything itself. In U.K. the Privy Council in a 3½ page judgment dismissed an appeal in a murder case after refusing the counsel to make a new point. (*Ragho Prasad* v. *The Queen*[22]), though in another murder case when an injustice of substantial character was brought to their notice, the Privy Council permitted a new point to be canvassed. (*Ajodha* v. *The State*[23].) While interfering with a conviction in a Magistrate's Court for a driving offence the High Court in England observed that it was the first case in which the sentence by the Crown Court had been challenged on the ground that it was harsh and oppressive. (*R.* v. *Crown Court at St. Albans*[24]. American Law Professers are dismayed at the tendency of the Appellate

16. (1981) 2 W.L.R. 188 at 190 (H.L.).
17. 418 U.S. 683 at 690 (1974).
18. A.I.R. 1977 S.C. 2185 at 2190.
19. A.I.R. 1980 H.P. 36 at 38.
20. 1979 Cr. L.J. 95 at 98.
21. 1981 Cr. L.J. 1398.
22. (1981) 1 W.L.R. 469.
23. (1981) 2 All E.R. 193 at 202.
24. (1981) 1 All E.R. 802 at 804.

Courts in allowing appeals and quote the admonition of a famous Judge 'Never unnecessarily make a monkey out of a trial Judge. Remember, he may be as good a lawyer as you are. (Appellate Review of Trial Court Discretion 79 Federal Rules Decisions pp. 173 at 174. Sometimes strictures have been passed on the trial Judge by the House of Lords describing his decision as 'astonishing' (*B.* v. *W.*[25]).

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32. Should the statute provide for a compulsory attempt to arrive at a compromise at the appellate stage ?

In U.S.A. a central funded scheme called the "Civil Appeal Management Plan (CAMP)" was launched in December, 1973 to ascertain whether the appellate work load could be reduced by attempts to compromise made by an independent agency. The Judges agreed that the CAMP did cause a reduction in the average time taken for the disposal of appeals because the discussion which the staff counsel had with the opposing parties improved the quality of counsel preparation and narrowing down of the matters in controversy. [Jerry Goldman Asstt Professor of Political Science, Northwestern University, Columbia Law Review (1978) Vol. 78, page 1209.]

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33. The above questions mainly cover the problems of fresh institutions. As regards the disposal of arrears, can you suggest any method other than appointment of retired Judges ?

The preceding questions focus on reducing fresh admissions and quicker disposal of pending matters. As regards the huge backlog of cases, a more or less uniform opinion has been expressed that unless sufficent number of Judges are appointed, the arrears cannot be cleared.

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34. Any other matter?

It would be appreciated that it is well-nigh impossible to compress and encompass in a questionnaire of this type all the problems relating to the judicial system and hence your comments on any facet of the matter would be highly appreciated. Chief Justice of India has welcomed an objective analysis of the functioning of the judicial institutions in the country if a constructive change was desired in their outlook.

(Presidential Address: Centenary Celebrations of the Nutan Marathi Vidayalaya Pune: 1-1-1982.)

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25. (1979) 3 All E.R. 83.

JUDICIAL SANCTION FOR COMPULSORY PRIVATE ACQUISITION OF PROPERTY.

A Critical Note on "*Muthusamy Gounder* v. *A. Annamalai*, (1981) 1 M.L.J. 258: 94 L.W. 617.

By

S. Govindarajan, B.SC., B.L., *Advocate*, *Chidambaram*.

A somewhat disturbing decision has been handed down to us by Justice Varadarajan in the decision reported in *Muthusamy Gounder* v. *A. Annamalai*[1].

The facts of the case are as follows:

The respondent filed a suit for declaration of title to the suit property and recovery of possession and for a mandatory injunction for removal of the superstructure. The trespass on the suit property was said to be in 1970. The appellant was the owner of the property, adjoining the suit property. The respondent became aware of the trespass only in 1972. Immediately thereafter, he filed the suit. Both the lower and lower appellate Courts granted a decree as prayed for.

Both the lower and lower appellate Courts have found that the appellant is a trespasser and has encroached upon the respondent's property and have granted a decree for declaration of title and for vacant possession after removal of superstructure by a decree for mandatory injunction.

Varadarajan, J., while concurring with the findings of the Courts below on the question of title and on the question of trespass, finds that the plaintiff will not be entitled to recovery of possession and mandatory injunction, based on the doctrine of equitable estoppel amounting to acquiescence and that she will be entitled to only compensation as per section 51 of the Transfer of Property Act. The learned Judge declares. "I hold that the plaintiff who resides about a mile away from the suit property, would have come to know about the defendant putting up constructions on major portion of the suit property if he had cared to find out and since he has not done so and kept quiet until the first defendant had completed his constructions .... and had sent notice only about 7 or 8 months later, after January, 1972, asserting his right to the suit property, I am of the opinion that the principle of acquiescence has to be made applicable to the facts of the present case and that the plaintiff has to be given only a decree fo compensation in respect of the property, normally the market value of the suit property in lieu of the relief of vacant possession of the property". His lordship states that he is bound by the decision of the Division Bench of this Court rendered in the *Associated Cement Corporation Limited* v. *L S. Radhakrishna Gounder*[2] ......and my own view in *S. Palanivelu* v. *K. Varadammal*[3].

I respectfully submit that this is a wrong approach and runs counter to several decisions of our High Court and other Courts and the Supreme Court.

Strong reliance is placed by his lordship on the judgment of the High Court in *Associated Cement Corporation Limited* v. *L. S. Radhakrishna Gounder*2 and a portion of the judgment has also been extracted by his lordship.

However, the learned Judge has overlooked some important aspects of that case. The Bench decision has taken the view as to the right of an owner to obtain possession from the trespasser, notwithstanding the fact that the trespasser had put up a construction on the land and in such a case the fact that a mandatory injunction has been asked for as incidental to the remedial way of possession, will not enable the Court to refuse to direct delivery of possession and to grant damages only.

Even though, laches or acquiescence on the part of the plaintiff can be taken into account in the exercise of the discretion for the grant of the equitable relief of injunction any and every delay will not constitute a ground for denying the relief of injunction to the plaintiff.

1. (1981) 1 M.L.J. 258 : 94 L.W. 617.

2. I.L.R. (1965) 1 Mad. 237: 77 L.W. 629: A.I.R. 1965 Mad. 318.

3. I.L.R. (1978) 1 Mad. 206: (1978) 1 M.L.J. 212: 90 L.W. 531: A.I.R. 1977 Mad. 342.

"To fix acquiescence upon a party, it should unequivocally appear that he knew the facts upon which it is founded and to which it refers ...... laches to bar the plaintiff's right must amount to waiver, abandonment or acquiescence and raise a presumption of any of them the evidence of conduct must be plain and unambiguous. *Murarilal* v. *Balkisan and another*[4].. In *K. Mohideen Bawe* v. *Rigoud Perfume Manufacturers*[5] .... it has been held: "Acquiescence is only a form of estoppel and it is of the essence of acquiescence that party acquiescing should be aware of and by words or conduct, should represent that he assents to, what is a violation of his rights and that the persons to whom such representation has been made, should be ignorant of the other party's rights and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party."

So unless acquiescence amounting to equitable estoppel is established, the plaintiff cannot be denied the relief of possession which he has asked for. An owner of the property, may lose his right to claim the property as his own by the principle of equitable estoppel in which event, there is no scope for exercising any discretion because the plaintiff is prevented from putting forward his title itself. For this, it must be established that the conduct of the owner whether consisting in abstinence from intervention or inactive intervention was sufficient to justify the legal inference.

The law on this question has been elaborately discussed by Justice M. M. Ismail in *Bodi Reddi* v. *Appu Goundar*[6]. With his characteristic thoroughness and lucidity his lordship has exhaustively discussed the question on various aspects with reference to various decisions and finally observed: "thus both on principle and on authority it is clear, that when the owner of a land files a suit for recovery of possession of his land from a trespasser who had built upon the land with incidental prayer for a mandatory injunction directing the defendant to demolish the building put up by him the plaintiff (owner) is entitled to succeed once he has established his title and the fact that he has been in possession of the property within 12 years from the date of suit....In this view *viz.*, that when the suit itself is for recovery of possession, the question of acquiescence or delay or laches on the part of the plaintiff cannot arise.... In a very early case, *Rama Rao* v. *Raja Rao*[7], referred to in *Premjet Jivan Bhate* v. *Haji Cassum Juma Ahmed*[8], this Court held that the equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act. Therefore once the suit is within time the doctrine of laches or acquiescence has no place to defeat the right of the plaintiff to obtain relief in the suit".In *N.C. Subbayya* v. *Pattan Abdulla Khan*[9]. Justice Viswanatha Sastri says: "To say the buildings erected in such circumstances should not be directed to be removed and only damages could be awarded would, in my opinion, be in effect to sanction a condemnation of the plaintiff's property and an appropriation of it for the defendant's use....To say that a small strip of building site could thus be appropriated by a trespasser would be to admit a rule of law which can be applied limitlessly". It is needless to refer to various other decisions as the decision of Justice Ismail is a comprehensive one.

Section 51 of the Transfer of Property Act cannot be applied to the case of a 'trespasser' as has been repeatedly stated by our High Court and in this case, this appellant has been found to be a trespasser by all the three Courts.

It is neither just nor fair to say that a man will lose his right to recover possession of property before the time limited therefor by Limitation Act simply on the basis of a rule of evidence.

This decision would tend to open the flood - gates of litigation and afford encouragement for the parties to trespass upon another man's property and put up a construction post-haste and smugly

4. A.I.R. 1926 Nag. 416.
5. (1932) I.L.R. 10 Rang. 133.
6. (1970) 2 M.L.J. 577.
7. (1864) 2 Mad. H.C.R. 114.
8. (1896) I.L.R. 20 Bom. 28.
9. (1956) 69 L.W. (Andh.) 52.

await the outcome as at best, he would be made to pay only damages. His lordship considers inaction for two years as amounting to acquiescence. In future cases, it may be further whittled down. Even if a party diligently takes action, the wrongdoer can complete the construction and contend that the construction was already there and plead acquiescence. This is really a dangerous trend. This would amount to setting the seal of approval for compulsory private acquisition and illegal annexation of property. Even under our Constitution, the much eroded property right can be curtailed only by a due process of State Law for public good. Here we find judicial recognition of compulsory private acquisition of property by a private individual on the basis of an act of trespass for his personal aggrandisement based solely on a flimsy rule of evidence.

For the foregoing reasons, I respectfully submit that the law laid down by Varadarajan, J., seems to require reconsideration.

THE COMPUTATION OF PERIOD OF LIMITATION IN THE TAMIL NADU DEBT RELIEF ACTS (XV OF 1976, XL OF 1978 AND XL OF 1979)

By

A. Ratnavelu, B.A., B.L. *Advocate, Krishnagiri.*

The provisions regarding computation of the period of limitation as contemplated in the Tamil Nadu Debt Relief Acts, XV of 1976, XL of 1978 and XL of 1979 for filing a suit or an application for execution of money decree, require further elucidation.

According to section 34 of the Act XL of 1979, "Whether, on or after the 15th day of January, 1976, but before the date of the publication of the Act in the Tamil Nadu Government Gazette, any suit for the recovery of any amount towards any liability arising out of the debt due from the debtor would have been instituted or any application for the execution of a decree passed in any such suit would have been made, *but for the fact that the institution of the suit or the making of the application was barred by the provisions of the Tamil Nadu Debt Relief Act,* 1978 (*Tamil Nadu Act XL of* 1978), *in computing the period* of limitation or limit of time prescribed for such suit or application, the period commencing on and from the 15th of January, 1976 and ending with the publication of this Act in the Tamil Nadu Government Gazette, shall be excluded".

For example, a person advances a debt of Rs. 5,000 (five thousand rupees) to the debtor (agriculturist) on 16th January, 1976. The question arises what is the date for computation of the period of limitation for the said debt as per the Act XV of 1976 or whether the Act XL of 1978 will prevail over the Act XV of 1976 in respect of the perriod of limitation.

According to section 3 of the Tamil Nadu Indebted Agriculturists Act, XV of 1976, the creditor is entitled to file a suit for the recovery of the debt or an application for the execution of a decree for payment of money, only after the expiry of two years and six months from the date of commencement of the said Act *i.e.*, 15th January, 1976 to 15th July, 1978 inclusively.

In view of the said Act, the period of limitation of the said debt commences on 16th July, 1978. But, the Act XL of 1978 comes into force on 15th July, 1978 providing permanent relief to the weaker section of society by terminating the moratorium imposed on recovery of the debts incurred prior to 14th July, 1978. The Act XL of 1978 terminated the temporary moratorium imposed on recovery of the said debt as provided in the Act XV of 1976, even on 14th July, 1978, instead of on 15th July, 1978 being the ending

period as provided in the Act XV of 1976. As per the Act XL of 1978, the creditor is entitled to recover only one half of the principal amount (five thousand) so advanced and one-half of the interest and the balance of the said debt is deemed to have been discharged. A principal amount Rs. 500 (Rupees five hundred) similarly advanced is also deemed to be wholly discharged, provided the debtor is not assessed to income-tax. or agricultural income-tax, sales tax, or property or house tax, during the relevant period as provided in the said Act XL of 1978. In view of the Act XL of 1978 the period of limitation for the aforesaid debt (five thousand) incurred on 16th January, 1976, commences on 14th July, 1978, itself, instead of on the ending period upto 15th July, 1978 inclusive as contemplated in the Act XV of 1976. Though the Act XV of 1976 is an independent Act, it is merged with the Act XL of 1978 in respect of the period of limitation.

It is equally difficult to get over the perplexity arising out of the computation of priod of limitation on the debts as per the Act XL of 1979. For example, a person advances a debt of Rs. 5,000 to "A" and Rs. 500, to "B", agriculturists, on 16th January, 1976 and he files a suit against the debtor (A) for the recovery of the said amount (5,000) on 17th July, 1981. According to section 1 (3) of the Act XL of 1979, the provisions of the Act except sections 32, 33 and 34, come into force on 15th July, 1978, and the said sections come into force on the date of the publication of the Act in the Tamil Nadu Government Gazette, *i.e.* 13th June, 1979. According to the section 33 (1) of the Act. XL of 1979 "*any liability incurred or arising* under any debt due from a debtor, shall be deemed never to have been *discharged under the said Act,* as if the said Act was not passed and every such debt shall be scaled down *in accordance with the provisions of this Act*". On a plain reading of the section alone, all the debts under the Act XL of 1978 are not deemed to have been discharged. All the debts whether barred or not under the Act XL of 1978, are not deemed to have been discharged and are liable to be scaled down as per the Act XL of 1979 irrespective of the bar on the one-half of the principal amount and one-half of the interest as contemplated in the Act XL of 1978. This section 33 (1) of the Act XL of 1979, seems to provide blanket immunity to all the debts irrespective of the bar on the filing of the suit for the recovery of the said debt as contemplated in the Act XL of 1978. The creditor is entitled to file a suit or an application against the debtor for recovery of the said debt Rs. 5000 with interest which was totally barred under the Act XL of 1978. In view of this section, the debtor would be liable to pay the full amount Rs. 5,000 with interest to the creditor as if the said debt was not barred partially for the one-half of the principal amount and one-half of the interest as provided in the Act XL of 1978. In a nut-shell the period of limitation for the said debts Rs. 5,000 and Rs. 500 would commence only on 13th June, 1979 as per the section 33 (1) of the Act XL of 1979.

The conflict arises between the section 33 (1) and section 34 of the Act XL of 1979 on the computation of the period of limitation for the one-half of principal amount and one-half of the interest which was barred under the Act XL of 1978. The question arises whether the period of limitation for the said debt Rs. 5,000 commences on 14th July, 1978 or whether the period of all the debts (*i.e.*, 500 and Rs. 5,000) commence on 13th June, 1979 as per the Act XL of 1979? This is a moot point to be considered in accordance with section 34 of the Act XL of 1979. It is apparent that the creditor is entitled to recover the full principal amount Rs. 500 (Rs. five hundred only) as per section 33 (1) of the Act XL of 1979. But in view of the section 34 of the Act XL of 1979 limitation started running for the said debt (Rs. 5,000) even on 14th July, 1978 itself.

While the Act XL of 1978 was in force, the right to file a suit or an application for the execution of money decree against the debtor, was not barred totally. But the creditor was entitled to one-half of the principal, amount and one-half of interest. Hence the bar was imposed on one-half of the principal amount and one-half of interest only until the publication of the Act XL of 1979, dated 13th June, 1979.

As per the section 34 of the Act XL of 1979, the period of limitation for the said debt Rs.5,000) incurred on 16th January, 1976,

has to be computed from 14th July, 1978 to 13th June, 1979 also, though the section 33 (1) of the said Act came into force on 13th June, 1979 for the full principal amount. The Tamil Nadu Government repeals the whole Act XL of 1978, except section 29 of Act XL of 1979. According to the "saving clause" the debtor is entitled to the benefits of the right and the privileges of any other laws available to him. The Act XL of 1979 is only additional to the other laws without derogating from or abrogating any law for the time being in force. So, in view of section 34 of Act XL of 1979, the period of limitation for the said debt, *i.e.*, Rs. 5,000 incurred on 16th January, 1976 suit for recovery whereof is to be filed on 17th July, 1981 commences even on 14th July, 1978 and it has to be computed from 14th July, 1978 to 13th June, 1979 also. The period of limitation for the said debt *i.e.*, Rs. 500 commences on 13th June, 1979 as per section 33 (1) of Act XL of 1979.

" A TRUE JUDGE "

By

R. RAJAGOPALAN, B.A., B.L. *Subordinate Judge, Namakkal.*

J. B. Foreman in his New National Dictionary, first publication defines a 'Judge', judgeship, 'Judg(e)ment', thus Judge (juj) n. one who judges; an officer authorised by the Crown to hear and determine Civil and Criminal Cases, and to administer justice; an arbitrator; pl. a book of the Old Testament; v.t. to decide; to hear and try a case in a Court of law; to give a final opinion; to come to a conclusion—judgeship. n. the office of a judge—judgment. n. the act of judging; a legal decision arrived at by a judge in a Court of law; discernment; a special infliction of suffering or death; an opinion......".

Thus, it is seen that a 'judge' is a person who judges things, considers men and matters and arrives at a finding or conclusion. His finding or conclusion from a given set of facts may be correct or may not be correct. If his finding or conclusion is in accord with the proved facts, it is a correct finding or a correct conclusion; if his finding is not in accord with proved facts it is an incorrect finding or conclusion. For example three plus three is equal to six. This is correct. But if the finding is otherwise it is an incorrect finding and it requires to be corrected either by himself if it falls within his limit or by an authority superior to him in office. If this finding, namely, that three plus three is not six but something else is rendered quite obstinately and wantonly then that finding is held to be "perverse".

Mere failure to appreciate facts in proper perspective cannot *per se* be perverse; it is only when the facts are appreciated quite obstinately the finding becomes "perverse".

The definition of a 'Judge' as seen above does not say that a judge must be a person authorised to find out the truth from falsehood in a given set of facts. The man being a rational animal is given the power of reasoning with which he is asked to arrive at a finding or a conclusion from a set of facts. The finding or conclusion deducible from a set of facts is called, the 'judgment'.

It is wrong to assume that by the 'judgment' being incorrect there has necessarily occasioned a failure of justice; and likewise, by the judgment being correct there has not occasioned at all any failure of justice.

Failure of justice or no failure of justice has no relevance at all with rendering of 'judgment'. As has been seen earlier, the dictionary meaning of the word 'judgment' is the act of judging; the legal decision arrived at in a Court of law, an opinion. So the legal decision arrived at by a judge from a set of facts may be wrong, yet there could be no failure of justice and so also, the legal decision arrived at from a set of facts may be correct, yet there could be failure of justice.

The test to find out whether any "failure of justice" has occasioned or not is the 'means' adopted by the 'judge' to give such a decision or such an opinion.

If the 'means' adopted is not tainted with illegality or immorality then notwithstanding the fact that the decision is against the facts proved it cannot be held that there is a 'failure of justice'; and at the least it can be said that it is an incorrect conclusion or decision or finding. Take the converse case. If the means adopted by the 'judge' to give a decision is tainted with illegality or immorality then notwithstanding the fact that the decision rendered is in accord with the proved facts, yet the decison can be said to be the result of 'failure of justice'. Therefore, to say that there has occasioned a 'failure of justice' means that the decision arrived at is the outcome of illegal 'means'. Thus, the determining factor for failure or no failure of justice is the 'means' adopted by the 'judge'. If the means adopted is illegal the consequence is 'failure of justice' despite the fact that the result is in accord with the proved facts.

The 'means' need not necessarily be by taking illegal gratification alone; it may include 'biased' look into the matter and also 'predetermined' view. Therefore, one of the traits of a 'judge' is his 'unbiased' look or approach into the matters in dispute. If a judge looks into the matter with a 'biased' look but comes to a conclusion which is in accord with the proved facts even then his judgment

cannot be said to be free from 'failure of justice'.

Such is the position of a 'judge' and his 'judgement', and that is why he is put in a very prominent place in the temple of justice. He is respected by one and all not because he is a 'judge' but because he occupies the key position in the temple of justice. He is considered to be the incarnation of God. When such is the nobility of his office is it justifiable for him on any account to depart from the righteous path of his office? The answer to this must be a big 'NO'. The 'judge' should not on any account, depart from his righteousness as a 'judge', come what may. He should not stoop to any level to seek material pursuits at any cost. He should be as good as a tiger even in case of hunger, poverty and untold miseries. Just as a tiger will never eat grass even during terrific hunger he should not depart from the path of a judge at any cost.

The moment he succumbs to temptations he ceases to be a 'judge'; he becomes a selfish animal with all vices. The downfall will set in not only in himself but in the entire society he moves about and in the country he lives on. When justice fails everything fails and the country will become doomed; it becomes a hell. A society with lawlessness will then prevail. Therefore, a 'judge' should be a 'judge' to the core, come what may.

Fearlessness is one of the virtues of a 'judge'. If he becomes corrupt, if he yields to temptations, then he falls a prey to the vultures of unscrupulous elements and the will be the root cause for the downfall of the society. When once he departs from his path of righteousness then it is practically an impossibility of setting right the wand of righteousness.

The grandeur of his office lies not in the pomp of his office but in his upholding the dignity of the office. The 'judge' is held in high esteem in society. Why? Not because of his personality but because of his rendering 'justice'.

A 'judge' must be dispensing justice without fear or favour, whether he is a friend or foe, whether he is a relation or stranger, whether he is rich or poor. To a 'judge' none is unequal. He bases no discrimination on ground of caste, creed or colour. Thus, the success of his career as a 'judge' lies largely in his dispensing 'justice' fearlessly against whomsoever he comes across.

Just like 'sugar' reminds of "sweetness", salt of sourness; chilly of pungency, bittergourd of bitterness, 'judgeship' reminds us of the dispensation of 'justice' and that is how he is placed on a high altar in society. This does not mean that other are held in low esteem. They too are respected but the 'judge' is on a better footing than the others.

The primary reason is that he is a person presumed to know everything on earth, whether science or arithmetic, geology or geography, medicine or engineering, philosopy or psychology and so on. Even if he is ignorant of these branches of knowledge he is made to know to decide the matter in dispute and render a finding thereon. His sphere of activities is therefore not confined to one particular branch of law alone; instead, it covers a wide range of activities. As for example, a medical practitioner is confined to medical sphere alone, an Engineer to Engineering alone, and so on. But the 'judge' is not so. He has to decide whether an incident is on account of the negligence of a particular person or persons or a Department; whether the death of a person is due to murder or suicide; whether the dismissal of a person is in accord with the rules and regulations of an institution, whether a divorce sought for by a husband or wife, as the case may be, could be granted or not and so on. Therefore, a 'judge' faces ever so many problems while dispensing 'justice'.

The Judge's job is not a bed of roses. Instead, it is full of thorns and the judge will have to walk over the same quite carefully without injuring himself. The position of a judge is analogous to a 'circus man' doing 'bar' or walking on fire or on a thorny wire. Even a slight error of judgment by the 'circus man' will cause him damage and so also to a 'judge' if he departs from his path as a 'judge'. Even a slight slur will cause a great

ear on the office of 'judgeship'; rather t will mar the dignity of his office. therefore, a 'judge' must always be watchful, alert and agile. He must be upto date in men and matters; otherwise, he will become a laughing stock. The success of the office of 'judgeship' lies heavily on the alertness of his mind, his mental calibre, his quick perception of facts like a camphor, and above all, he must be having a retentive memory. A sound judgment comes of a sound mind and body. To have a sound mind and body, judges should be put above want. Putting him under stresses and strains in his life and expecting from him a golden egg daily is expecting too much.

For the sake of comforts, judges should not sacrifice their jobs. In fact, judge's job is a sacrificing job; sacrificing his own comforts, his own family and so on, as he could even hardly find time to attend to his own personal affairs. Despite these odds, if a 'judge' makes a mark in his office he is considered to be a 'successful judge'.

After all a judge is also a human being susceptible to earthly pleasures. Without sacrificing his office if he enjoys life, really he will be considered to be a 'judge' worthy of repute; instead, if he cares more about his earthly pleasures and departs from the path of his office, he ceases to be a 'judge' and none will care for or respect him.

So be an honest judge, a true judge, true to his office, true to his conscience, true to his country and true to humanity and all creatures of God at large. He alone will be the true and real 'judge', others are all make-believe 'ones'.

RIGHT TO COUNSEL VIS-A-VIS THE POOR UNDER THE AMERICAN AND INDIAN CONSTITUTIONS

By

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"Laws grind the poor, and the rich men rule the law"

— *Oliver Goldsmith*

I

General:

Human Rights are broadly divided into two kinds—Civil and Political rights and Social and Economic rights. There is an intricate relationship between the two kinds of rights. The basic assumption in every legal system is that the citizen knows the law of the land. In an increasingly complex society, citizens also need to have access to the law in order to secure their rights and defend in case of encroachment or abridgment of their rights.

Litigation, legal assistance and advice are expensive services throughout India when compared to the general standard of living in the country. Several persons are unable to press their just and reasonable claims in Courts of law due to poverty. Due to the same reason a poor man accused of an offence is unable to defend himself at all. It is the duty of a welfare State to see that no one should be financially unable to pursue a just and reasonable claim or to defend when his life and liberty is endangered.

The concept of 'fair trial' demands certain safeguards. One of the most important rights of one accused of crime is the right to be represented by a counsel. Public attention has, of late, focussed on the inequalities of criminal process *vis-a-vis* the poor. What Sutherland, J., of the Supreme Court of U.S.A. wrote in *Powell* v. *Alabama*[1] in 1932 is worth recalling in Indian conditions at present.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial with a proper charge and be convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to perform his defence, even though he may have a perfect one—he faces the danger of conviction because he does not know how to establish his innocence".

To appreciate the statement it is necessary to know the position of the right to counsel under the American and Indian Constitutions and also its rhetoric in Declarations and International Conventions.

II

Position in U.S.A.:

The 'Bill of Rights,[2] contains certain concepts inherited from common law. The concept of 'fair trial' demands certain safeguards which may not fall below certain minimum even if it be that vague minimum of 'due process'[3]. But the Bill of Rights cannot be a panacea. It provides one possible approach to the solution of difficult and fundamental problems.

The origin of the VI Amendment lies in the fact that even the educated layman is at a tremendous disadvantage in defending himself against criminal charges because of the complexities of criminal law and procedure.[4]

VI Amendment:

'In all criminal prosecutions, the accused shall enjoy the right .... to have the assistance of counsel for his defence."

Robert Cushman says that 'the right of a person being tried for a crime to be repre-

1. (1932) 287 U.S. 45.

2. The first ten Amendments were adopted in 1791.

3. Abraham Henry, J.: Freedom and the Court (1977), P. 131.

4. Rich Vernon: Law and Administration of Justice (1975), P. 19.

sented by counsel trained in law has been recognised in this country since earliest times[5]'. The original meaning of the right to counsel extended only to permission for the accused to employ and bring into trial a lawyer of his choosing. No general provision was made for the indigent defendant who might want and even badly need counsel, but who was too poor to employ a lawyer. Thus the VI Amendment provision for 'assistance of counsel for his defence' in 'all criminal prosecutions' was permissive only. It imposes no duty on the government to provide free counsel. The Federal Crimes Act, 1790, however, provided that counsel must be appointed in all capital cases at the request of the defendant.[6] There was no such obligation in other types of cases.

The path-breaking modern case is *Johnson v. Zerbat.*[7] Johnson was convicted on a charge of passing counterfeit notes in a federal Court. At trial, the Judge neither advised him of his right to counsel nor offered a Court appointed attorney. He filed a petition for *habeas corpus,* alleging that his trial without counsel violated the VI Amendment. The Supreme Court held that the VI Amendment right to counsel extends to the appointment of counsel for indigent defendants in federal criminal proceedings unless the accused waives the right.

In *Powell v. Alabama*[8], the Court for the first time considered the question whether an accused in the state criminal proceedings may assert a right to counsel under the 'due process' clause of the XIV Amendment.[9] This case involved seven Negro boys charged with the crime of rape committed on two white girls. Each of the defendants had been found guilty and sentenced to death. The Supreme Court on a review of the case held that failure to accord the benefit of counsel for the defendants in an effective way operated to deny them the 'due process of law'. The Court said that the 'due process' clause assures to every defendant the right to be represented by a counsel and also imposes on the State the duty at least in the circumstances of the case to make an effective appointment for defendants who are *without the means* of employing a counsel.[10]

Powell v. *Alabama*[11] was given a restricted application in the cases that followed. In *Betts* v. *Brady*[12], the Court held that a State did not deny due process of law to an indigent defendant indicted for robbery who had requested that counsel be appointed for him. He was advised by the trial Court that it would appoint the counsel for indigent defendants only in prosecutions for murder and rape. The Court upon a review of the case said that the State was under a duty under the due process clause of the XIV Amendment to appoint a counsel for an indigent only when the circumstances indicate that this would be necessary to assure a fair trial for him.

Since 1942, when *Betts* v. *Brady*[12] was decided by a divided court, the problem of a defendant's federal constitutional right to counsel in a State Court has been a continuing source of controversy and litigation in both State and Federal Courts. This uncertainty was settled in *Gideon's case.*[13]

In *Gideon* v. *Wainwright*[13], the petitioner was charged for a misdemeanour. He asked the Court to appoint a counsel for him. The Florida Court rejected his claim on the ground that the right to appoint a counsel applies to capital cases only. Thereupon, Gideon conducted his defence and the jury returned a verdict of guilty. Upon a review of the case, the Supreme Court overruled *Betts* v. *Brady*[12] and held that representation by counsel is a ***constitutional necessity in all criminal trials.***

5. Cushman, Robert, F.: Cases in Civil Liberties (1968), P. 275.
6. Abernathy, Glenn: Civil Liberties under the Constitution (1977), P. 189; also Cushman supra, P. 275.
7. (1938) 304 U.S. 458.
8. (1932) 287 U.S. 45.
9. Adopted in 1868.
10. Kauper: Cases in American Constitutional Law (1972), P. 894.
11. (1932) 287 U.S. 45.
12. (1942) 316 U.S. 455: Similarly in Bute v. Illinois, (1948) 333 U.S. 640 where Bute was convicted for taking 'indecent liberties with children', the Court found no fundamental unfairness in the trial and nothing unusual in the status of the defendant which would have demanded counsel.
13. (1963) 372 U.S. 335.

Extent of the right:

The right to counsel exists at every stage of the trial; from arraignment upto the sentence; the right subsists at every stage of the trial whether the accused requests for counsel or not. A denial of this right even in the pre-trial proceedings violates due process if the accused is so prejudiced that his subsequent trial is infected with an absence of 'that fundamental fairness which is essential to the very concept of justice'[14]. The constitutional guarantee includes not only the right to have a fair opportunity to secure a counsel of his own choice but also the right to consult him privately[15].

Another aspect of the right to counsel to be considered is the minimal offence to which it applies. Since the VI Amendment extends the right "to all crimiral prosecutions" it is arguably a right enforceable even in cases involving petty offences[16]. In *Argensinger* v. *Hamlin*,[17] the Court extended the right to counsel to all cases, felony or misdemeanour, in which there is any possibility of jail sentence.

In *Miranda* v. *Arizona*[18], the question was the extent to which a suspect was entitled to have the advice and assistance of counsel during police questioning. At this stage, the right to counsel is inextricably tied up with the problem of self-incrimination because the presence of a lawyer is the most efficacious safeguard against self-incrimination. The Court held that "the need for counsel to protect the V Amendment privilege comprehends not merely the right to consult with counsel prior to questioning but also to have counsel present during any questioning, if the defendant so desires".

The American Bar Association has upheld the fundamental premise that counsel should be provided in criminal proceedings for offences punishable by loss of liberty, except those types of offences for which such punishment is not likely to be imposed. Clearly the truth of Justice Sutherland's statement as to the indispensability of counsel to a fair trial is not contingent upon the length of time one's liberty is to be taken away.[19]

In America, strengthened by the *Powell, Gideon* and *Hamlin cases,* counsel for the accused in the more serious class of cases which threaten a person with imprisonment is regarded as an essential component of the administration of crimiral justice and as part of procedural fair play. This is so without regard to the VI Amendment because lawyer participation is ordirarily an assurance that deprivation of liberty will not be in violation of procedure established by law.

Thus, judicial pronouncements have qualitatively transformed the constitutioral provisions of equal protection and fair trial across the Atlantic.[20]

III

Position in India:

The Constitution of India preaches 'equality' and visualises a society in which equal justice is made available to all the members irrespective of thir economic background. Article 14 enjoins the State to provide equality before law and equal protection of the laws. According to Jennings, equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike[21]. In our adversary system of litigation and adjudication the parties cannot be on an equal footing in a Court of law unless they have the capacity to pay the fee and to engage a competent lawyer of their choice. For this reason, the Constitution of India in Article 22 (1) directs that when a person is arrested for any offence he shall not be denied the right to consult and be defended by a legal practitioner of his choice.

A large majority of Indians are very poor and illiterate, living below subsistence level. In spite of all keenness to protect their life and personal liberty, they, when inculpated in a criminal case, feel themselves helpless in the matter of engaging a lawyer for their defence, for want of funds. On account of illiteracy and indigence, they cannot plead

14. Ecobendo v. Illinois, (1964) 378 U.S. 478; also Hamilton v. Alabama, (1961) 368 U.S. 52; White v. Maryland, (1963) 373 U.S. 59.
15. Ibid, P. 478.
16. Rich, Vernon: Law and the Administration of Justice (1975), P. 23.
17. (1972) 407 U.S. 25.
18. (1966) 384 U.S. 436.
19. Saligman: Poverty as a public issue (1965), P. 192.
20. Krishna Iyer, V. R.: Social Mission of Law (1976), P. 106.
21. Jennings Ivor: Law and the Constitution, 3rd Ed., P. 49.

for themselves before the Court. The question whether such persons can claim from the State a right to free legal aid has been in debate before the Court from time to time.22

Conservative criminal jurisprudence:

Our Supreme Court had the occasion to deal with the right to counsel of an accused in *Janardhan Reddy* v. *State of Hyderabad.*23 It was held that the American rule enunciated in *Powell* v. *Alabama*24 which is founded on the doctrine of due process clause does not extend to India and that in India there is no absolute right to be supplied with a lawyer by the State. Section 340 (1) of the Criminal Procedure Code, 1898, provides that an accused has the right to be defended at the trial by a lawyer.25 The Court said "the right conferred by section 340 (1), Criminal Procedure Code, does not extend to a right in an accused person to be provided with a lawyer by the State or by the police or by the Magistrate.23 This is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one for himself or get his relatives to engage one for himself. The only duty cast on the Magistrate is to afford him the necessary opportunity.1 The Rajasthan High Court, on the other hand, took a different stand. In *Moti Bai* v. *State of Rajasthan*2, the Court held that the wide ambit of the right to counsel written into the Constitution is apparent from Article 22 (1) which obligates intimation of the grounds of arrest to every arrested person and allows him right to counsel for advice and defence.

22. Kripal Singh Chhabra: Legal Aid in Criminal Proceedings,' Vol. 22, JILI, 1980, P. 371.

23. 1951 S.C.J. 320: 1951 S.C.R. 344: 64 L.W. 406: A.I.R. 1951 S.C. 217.

24. (1932) 287 U.S. 45.

25. Section 340 (1), Criminal Procedure Code, says "any person accused of an offence before a criminal Court or against whom proceedings are instituted under this Code in such a Court may by right be defended by a pleader".

1. See Tara Singh v. State, 1951 S.C.J. 518: (1951) 2 M.L.J. 291: 64 L.W. 996: A.I.R. 1951 S.C. 441.

2. A.I.R. 1954 Raj. 241.

The Law Commission of India in its 14th Report recommended that free legal assistance be provided to undefended accused without sufficient means, tried before the Court of sessions. In its 48th Report, the Law Commission suggested making of provision of free legal assistance by the State for all accused who are undefended by a lawyer, for want of means. However, only the former recommendation has been adopted in the Criminal Procedure Code, 1973. Section 304 of the Code provides that where, in a trial before the Court of sessions, the accused is not represented by a pleader, and where it appears to the Court that the accused has no sufficient means to engage a lawyer, the Court shall assign a lawyer for his defence at the expense of the State. Article 22 (1) of the Constitution, on the other hand, guarantees to the accused his fundamental right to be defended by a 'legal practitioner of his own choice'. The statutory provision cannot override the constitutional guarantee under Article 22 (1). In fact, they are analogous.3

Undertrial prisoners case :

The Supreme Court of India attempted a break-through to the traditional conservative interpretation in the case of *Hussianara Khatoon* v. *State of Bihar.*4 A large number of men, women and children were behind the bars for years awaiting trial in Courts of law. The offence with which some of them were charged were trivial, which, if proved would not even warrant punishment for more than a few months, perhaps a year or two. Yet these "unfortunate forgotten specimens of humanity were kept in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced." The Court obseved that "it is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial"5. There can, therefore, be no doubt that speedy trial, and by speedy trial is meant reasonable and expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.

3. D. D. Basu: Criminal Procedure Code, 1973 (1979), P. 672.

4. (1980) 1 S.C.C. 81: (1980) S.C.C. (Crl.) 23: A.I.R. 1979 S.C. 1360.

5. Ibid, P. 1361.

Dynamic interpretation of Article 21:

It is now well settled, as a result of the decision in *Maneka Gandhi* v. *Union of India*[6] that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the Courts process that he should have legal services available to him[7].

In *M. H. Hoskot* v. *State of Maharashtra*[8] the Court observed: "Judicial justice with procedural intricacies, legal submissions and critical examination of evidence, leans upon professionl expertise and a failure to equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer power for steering the wheels of equal justice under the law". Free legal services to the poor and needy is an essential element of any 'reasonable, fair and just' procedure[9].

Procedural safeguards are the indispensable essence of liberty. In fact, the history of procedural safeguards and the right to a hearing has a human right wing. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights[10].

Bhagalpur Blindings case:

In *Khatri* v. *State of Bihar*[11], the Supreme Court of India reiterated that the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course, the accused person does not object to the provision of such a lawyer.

A Constitutional Mandate:

The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of offence and it is implicit in the guarantee of Article 21. The State Government cannot avoid its constitutional obligation to provide free legal service to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State.

Moreover, the constitutional obligation to provide legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused for the first time is produced before a Magistrate. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be 'reasonable, fair and just' which denies legal advice and representation to him at this stage[12].

The widespread insistence on free legal assistance where liberty is in jeopardy, is obvious from the Universal Declaration of Human Rights of 1948. Article 8 provides that every one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights guaranteed by the Constitution or Law.

Similarly the European Convention on Human Rights, 1950 has provision to the same effect. Article 6 (3) (*c*) says: 'Every one charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if

6. (1978) 1 S.C.C. 248: (1978) 2 S.C.R. 621: (1978) 2 S.C.J. 312: A.I.R. 1978 S.C. 597.
7. (1980) 1 S.C.C. 98: (1980) S.C.C. (Cri.) 40: A.I.R. 1979 S.C. 1369 at P. 1373.
8. (1978) 3 S.C.C. 544: (1978) S.C.C. (Cri.) 468: A.I.R. 1978 S.C. 1548.
9. Ibid P. 1554: also K. L. Bhatia: Legal Aid Clinic (1975).
10. Ibid P. 1553.
11. 1981 Cri.L.J. 470: (1981) 1 S.C.C. 635: A.I.R. 1981 S.C. 928, 930, 931.
12. Op. Cit, P. 931.

he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.

Article 14 (*d*) of the International Covenant on Civil and Political Rights, 1966, guaranteed to every one....the right to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, all without payment by him in any such case if he does not have sufficient means to pay it.

V

Legal aid to the poor:

The idea of legal aid to the poor lays down simply that no man shall be denied his right at law for lack of means; otherwise 'the poor litigants often forego a good claim due to non-availability of legal service at moderate cost.'[13] The twin objectives of legal aid apparently are: (1) to promote the knowledge of law among the indigent, and (2) to provide them equal access to the Courts[14].

The adversary system of justice which we have inherited from the British can by its very nature produce desired results only if parties are 'equal', trials are 'fair' and judges are 'independent'. The Constitution and laws of our country have provided for an 'independent judiciary' a 'fair trial' and certain 'procedural safeguards' for an accused person. But in spite of all these well-intentioned laws in the Statute books, in actual operation, the State has immense advantages in criminal prosecutions particularly when the defendant is poor, ignorant and illiterate. In fact, the fairness of a criminal justice system is determined not so much by the imperative provisions in favour of accused in the Constitution, in the Criminal Procedure Code or in the Evidence Act, but by the quality and methods of personnel in the police and prosecuting departments as well as the competence of the lawyers the accused persons can manage to employ[15].

Legal aid is one form of social justice in action, the fulfilment of the promise in the preamble of our Constitution. Legal aid to the poor constitutes society's attempt to mitigate or minimize the unequal or discriminatory operation of the legal system in favour of the rich and against the weaker sections of the community. It is a positive state of obligation under the Constitution of India which guarantees to every citizen "equality before the law" and "equal protection of the laws". Justice Krishna Iyer cautions that if the lower bracket feels insecure in Court this insecurity weakens the polity[16]. In the same vein Dr. Menon points out that 'the survival of democracy, rule of law and peaceful social change is dependent heavily on the speed and sincerity with which the institution of legal aid is used to reach the benefits of law to the poor and to humanise the entire legal process on socially purposeful lines'.

The legal process, without legal aid to the poor may be, in the language of Chief Justice Taney a guarantee of anarchy and not of order. Without legal aid, petitions of appeal, applications for commutation or parole, bail motions and claims for administrative benefits would be well-nigh impossible. There is a case for systematised and extensive assistance through legal aid lawyers to the poor people. Many high level committees and commissions have emphasised the free legal service desideratum as integral to processual fair play for prisoners.

The philosophy of legal aid as an inalienable element of fair procedure is evident from Justice Brennan's well-known words:

> "Nothing rankles more in the human heart than the brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to

13. K. L. Bhatia: Legal Aid Clinic (1975).

14. Nawaz: Prospects of Legal Aid, Vol. 66, A.I.R. 1979 Jans, P. 57.

15. Dr. N. R. Madhava Menon: "Legal Aid in Criminal Proceedings" Social Defence, Vol. XIII No. 50, Oct., 77.

16. V. R. Krishna Iyer: Social Mission of Law (1976), P. 107.

the continued existence of free democracy is not imaginary, but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness[17]."

In India, the need for legal aid was no doubt envisaged by the Law Commission, as early as 1958, when in its 14th Report it stated that:

> " ....equality is the basis for all modern systems of jurisprudence and administration of justice.......In so far as a person is unable to obtain access or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose. Unless some provision is made for assisting the poor man for the payment of Court fees and lawyer's fee and other incidental costs of litigation, he is denied equality in the opportunity to seek justice[18]".

The Constitution (Forty-second) Amendment Act in 1976 realising the necessity of legal aid introduced Article 39-A[19]. This Article lays before the State the ideal of providing free legal aid to citizens suffering from economic or other disabilities. It contemplates that there should be equal access to law for the rich and the poor alike. But this constitutional directive is yet to be translated into positive legal duty of the State through parliamentary legislation. Some States, like Karnataka, Kerala, Gujarat, Tamil Nadu and Andhra Pradesh have initiated State-wide legal aid programmes.

The State may not, however, be able to spare sufficient funds to meet the need in all cases in view of the demands of developmental activities. The Supreme Court observed that the State may have its financial constraints and its priorities in expenditure, but the law does not permit any government to deprive its citizens of constitutional rights on the plea of poverty[20].

One of the solutions may be to be selective and refuse assistance to such type of offenders who do not deserve free legal aid in view of their past conduct or in view of the nature of the present offence. Habitual offenders — opiates, drunkards, gamblers, smugglers, economic offenders, offenders under the Arms Act or those violating social legislations libe anti-dowry Acts, untouchability laws — may be excluded from the purview of the legal aid schemes[21].

VI

Access to Law :

A basic assumption of our legal system is that the citizen knows the laws. In an increasingly complex society, citizens should have knowledge of law. It is common knowledge that about 70 percent of the population of the rural areas are illiterates and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much of lack of awareness that it has always been recogised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy[22].

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17. (1980) 1 S.C.C. 98: (1980) S.C.C. (Crl.) 40: A.I.R. 1979 S.C. 136, at P. 1376.

18. 14th Report, Vol. I, P. 587 et. seq.

19. **Article 39-A: Equal Justice and Free legal aid.**—The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes as in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disablities'.

20. (1980) 1 S.C.C. 98: (1980) S.C.C. (Crl.) 40: A.I.R. 1979 S.C. 1369 at P. 1376.

21. 1981 Crl.L.J. 470: (1981) 1 S.C.C. 635: A.I.R. 1981 S.C. 928 at P. 932 also Kripal Singh Chhabra "Legal Aid in Criminal Proceedings", Vol. 22, JILI, 1980, P. 374.

22. (1981) 1 S.C.C. 635: (1981) Crl.L.J. 470: A.I.R. 1981 S.C. 928 at P. 931.

There are various devices by which access to law is made possible : These are (1) improving the existing legal materials; (2) providing courses on law for non-lawyers; (3) ensuring an adequate information delivery system; and (4) producing a new source of law for non-lawyers[23].

Law for Laymen:

Justice Krishna Iyer says that simple pamphlets in the language of the people, motion pictures, radio and TV publicity, explaining criminal statutes affecting the common people are *sine qua non* for legal aid[24].

Another possible solution to the problem of access to law is the expansion of the existing legal aid plans to include legal aid clinics to which legal questions and problems of all kinds could be directed.

23. Friedland: Access to law (1978).

24. Krishna Iyer: Social Mission of Law, P. 109.

RETIREMENT OF JUDGES DURING 1981-82

It seldom happens that four Judges retire in quick succession in the course of a year. It happened during 1974-75. It has happened again now. Chief Justice Ismail retired in July, 1981. That was, however, a premature retirement, a result of unusual combination of circumstances, depriving the High Court of the services of a very outstanding Judge in recent years and showing that the man was greater than the post. Within a few months thereafter Justice Suryamurti retired and towards the close of 1981, Justice Venugopal and then Justice Sethuraman have also retired. As to what is expected of a Judge, Sir Winston Churchill once observed: "A form of life and conduct far more severe and restricted than that of ordinary people is required from Judges. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct". Apart from talent, proper temperament and a perennial interest in the intricacies of law, other qualities indispensable to a Judge are great judicial patience, detached outlook and a sense of fairness and justice. The Sukra-Nitisara emphasises: "The Judges appointed by the King should be well-versed in procedure, wise, of good character and temperament, soft in speech, impartial to friend or foe, truthful, learned in law, active (not lazy) and free from anger, greed or desire". These are the standards set. The acid test on the more practical plane is; how did the Bar react to the departure of the Judge, whether it genuinely felt sad or remained indifferent or heave a sign of relief? As a Judge, Justice Suryamurti was regarded as not being oppressed too much by rules and technicalities in the matter of rendering justice. His experience as a member of the subordinate judiciary for well nigh twenty-five years had made him familiar with all types of work, civil and criminal, trial as well as appellate. He had a keen knowledge of the psychology of the litigant public. He was deeply interested in literature both English and Tamil and was an avid reader. His judgments ran in easy fluent style.

Justice Venugopal's tenure as a Judge of the High Court was relatively short having been appointed on 25th January, 1979. He went to the Income-tax Appellate Tribunal as a Judicial Member in 1968 and served in that capacity till he became a Judge of the High Court. He had participated in a number of Seminars and Conferences on tax laws. As a Judge, he was noted for fair and patient hearing, pleasant manners towards seniors as well as juniors. He was fully alive to the practical difficulties experienced the Bar, and put at case every one who appeared before him. These qualities made every practitioner feel at home in his Court. He could easily grasp the facts as well the legal questions involved in a case and his knowledge of law never left him in puzzlement. He won the goodwill of the Bar and his judgments have been regarded generally as satisfying.

Justice Sethuraman was from the beginning, a fairly popular Judge. He had been an advocate practising at the Madras Bar for about seventeen years, his speciality being taxation law. In 1960, he accepted appointment as a Member of the Income-tax Appellate Tribunal becoming Vice-President in 1972. He held that office till his elevation to the High Court as a Judge in February, 1974. Though dealing with Income-tax matters he had, all the time been keeping himself abreast in other fields of law as well. Imbued with a deep sense of justice he constantly strove to get at all the facets and details of a case coming up before him for decision. Endowed with a fairly penetrative mind he could set things is the proper perspective and get at the core of the problem. He never felt bored with his work and was hard-working. He was always clear as to what he wrote. His judgments reflect his clarity of thought and expression however complex and complicated the question may be and to whatever branch of law the question appertained. His dealing with the constitutional issues involved in the Writ Cases challenging the validity of the Commissions of Inquiry appointed by the State and Central Governments respectively in connection with what is familiarly known as "Spirit Scandal", under the Commissions of Inquiry Act, reveals a high sense of detachment and careful evaluation avoiding pitfalls and morasses.

A devout and pious Hindu, having a profound belief in our ancient culture and ethical values of Hinduism, Justice Sethuraman is a keen student of Sanskrit literature. He is

also an ardent lover, in particular, of Carnatic and classical music. He has been actively associated with educational institutions being the President of the Board of Management of Lady Sivaswami Aiyar High School for Girls in Mylapore and a Member of the Board of Trustees for the Sir P. S. Sivaswami Aiyar High School for Boys at Tirukattupalli. He has been taking part in cultural meetings and has been contributing articles on legal and other questions. The members of the Bar have felt happy to appear before him.

All the three retired Judges are still in the plenitude of intellectual power and can be expected to give of their best in whatever work or service is sought from them in the cause of the country.

OUR NEW CHIEF JUSTICE

Mr. Krishna Ballabh Narain Singh, Chief Justice of the Patna High Court has become our Chief Justice. From a High Court younger in age but possibly with a larger number of Judges he comes to our High Court, one of the three early established Chartered High Courts of the country with great traditions and prestige. This is the first time after attainment of Independence that the Chief Justice of another High Court is appointed Chief Justice of the Madras High Court.

Assuming that the power to transfer a Judge from one High Court to another comprehends the power to transfer a Chief Justice also, the exercise of the power may not have evoked any bitterness in the present case but for a lurking suspicion that the present appointments were motivated or had political overtones. The timing as well as the manner in which the transfers were made seemed to lend colour to the impression. At one time it was the general opinion that by convention the seniormost Judge of the High Court is appointed Chief Justice. The convention was based on the view that, on the whole, the interests of judicial administration are better served by eliminating the exercise of discretionary power in the appointing authorities than by the search for the best. (Seervai, Constitutional Law of India, 1st edition, page 1009). Now that the existence of the power to transfer a Chief Justice from one High Court to another as well as the legitimacy of the exercise of the power in the present case had been put in issue before the Supreme Court and resulted, albeit by a narrow majority, in a decision favourable to the Government, it is to be hoped that the feelings engendered by the controversy will die down.

Chief Justice K. B. N. Singh was born on 25th January, 1922. Having secured his law degree from the Patna University, he was enrolled as an advocate on 9th December, 1946. Avidity for work, amiable manners and intellectual equipment of a high order were responsible for his rapid rise in the profession and his amassing a lucrative practice. He had taken in his stride many important civil, criminal, constitutional and taxation cases and won a reputation for fair and able advocacy. In criminal cases he had observed the norm that the duty of a prosecutor was not to secure a conviction at all cost but to present the case fairly. He became Government Pleader and, from 15th November, 1966, he was an Additional Judge of the Patna High Court. He was made a permanent Judge from 21st March, 1968. On 1st May, 1976, he became acting Chief Justice and was made permanent on 19th July, 1976. The Chief Justice has the reputation of being an able and conscientious Judge, receptive to arguments, sweet-tempered and patient. He has also been taking great interest in the legal aid movement.

We wish him a successful tenure of office as Chief Justice of our High Court and convey to him our respectful felicitations.

THE QUIBBLE IN QUORUM AND THE RIDDLE REGARDING RESOLUTIONS IN PUBLIC LIMITED, COMPANIES.

By

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Precisely postulated the problem is projected in the form of two questions. They are as under:—

1. Should the quorum be present at the time of passing the resolution?

2. Whether Company's interest more than minorities' interest is protected by insisting for three times the number of votes to be in favour of the special resolution in proportion to the votes that are cast against it?

Quorum:—Two fundamental features are found to constitute a valid meeting. They are sufficient notice and proper quorum. If these twin factors are lacking, a meeting is not deemed to have been duly convened and properly constituted. There is a popular view that it is enough if the quorum is present at the time of starting of the meeting and that the quorum may sneak away subsequently at the time of passing the resolutions. Support to this view is sought found in the ruling given In the matter of *Hartley Beard Ltd.*[1]. In that case a clause in the articles of a company provided that "no business shall be transacted at any general meeting unless a quorum is present *when the meeting proceeds to the business.* It is said that the condition is sufficiently complied with if there is a quorum present at the beginning of the meeting when it proceeds to business and the subsequent departure of a member reducing the strength of the meeting below the number required for a quorum does not invalidate the proceedings at the meeting after his departure.

Dr. Avatar Singh has opined in his book on Company Law at page 309, Sixth Edition 1980, that the authority of this statement has been to a certain extent undermined by another recent case "In re, *London Flats Ltd.*[2]". Facts succinctly summarised unfold that a meeting was attended by two members. The chairman was the majority shareholder. The other member proposed a name for appointment as Liquidator. The chairman moved an amendment and proposed himself. Thereupon the other member left. The chairman by his majority vote confirmed his appointment. In this case the Court refused to uphold the appointment on the ground that any further proceedings after the other memmer had left were a nullity. Dr. Avatar Singh abruptly ends the subject by citing the Editor's note on the case in 1969 J. B. L. 2301. (*See also* In re, *Sombrero Ltd.*[3], where the Court upheld the removal of a director by a meeting attended by one member). The pertinent question in the Editor's note is "should it be the law minority shareholders realising that they cannot defeat a resolution by the constitutional process of voting against it, should be able to frustrate the wishes of the majority by walking out of the meeting?

In other words the above passage indirectly conveys the meaning that if the presence of a quorum is made compulsory throughout the meeting it is possible that some unscrupulous members taking advantage of the technical formality may stage a walk-out so as to reduce the strength of the meeting to dwindle down below the number prescribed for the quorum and thereby successfully stultify the *bona fide* proposed resolution of the meeting.

Whatever be the position, Article 49 (1) of Table 'A' of the Companies Act says "that no business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business". Mr. M. C. Khuchal's book on 'Secretarial Practice' under chapter 'General meeting practice and procedure, at page 38, says that from the wordings it is implied that quorum is required to be present at the beginning of the meeting and need not be present throughout or at the time of taking votes on resolution". It is really surprising that no one has attempted to explain the meaning of the sentence "the meeting proceeding to the business".

1. (1955) 1 Ch. 143: (1954) 3 W. L. R. 964: (1954) 3 All E.R. 675.
2. (1969) 2 All E. R. 744: (1970) 1 Comp.L.J. 28.
3. (1958) 3 W.L.R. 349.

The meaning of the word 'business of the company meeting' could be referred in the book entitled "The Corporation of Secretaries Manual on The Law of Meetings, Their conduct and procedure" (Third revised edition by Mr. Seabag Shaw, LL.B. and Mr. E. Dennis Smith, LL.M., Chapter XII, page 135)[4]. It is said that 'the business of a meeting of a company is effected by one or other of three forms of resolution, (*a*) ordinary; (*b*) extraordinary; (*e*) special. Each of these has its particular aptness for certain kinds of business". From this it is obvious that business has reference only to the passing of resolutions.

It may further be argued that it is enough if initially the quorum is present for starting the meeting and thereafter especially when the sense of the meeting is to be ascertained by poll only the presence of the proxies are required to cast their votes. This position sounds tenable in form but in substance it lacks reality. Take for example a case where an amendment has to be mooted out or a discussion has to take place before passing a resolution, how is it possible to suggest further amendments to the amendment on the question or discuss the matter if the members are not present at the meeting.

Furthermore it is said that it is one of the duties of the chairman to ascertain the minorities' views. How could the minorities' views be ascertained unless the members are present throughout the meeting and vote? Therefore there is absolutely no meaning in saying that a person comes all the way to start the meeting to constitute the quorum and thereafter departs after the proceedings have started. It is interesting to note that one person even though he holds proxies from all the shareholders cannot form a quorum and no valid business can be transacted by a single member since there is no meeting. (*Sharpe* v. *Dawey*[5]). So when the quorum is fixed for any meeting, it is necessary that the quorum be present throughout the meeting[6].

Special Resolution.—The object of a Special Resolution under section 189 of the Act is primarily that no decision in the meeting should be subject to the mere support of a numerical majority or road-rolling majority with no opposition. The very crux of the special resolution is that the votes cast in favour of it should be thrice as much as the votes cast against it. Resolutions are classified under three methods of ascertaining the sense of the meeting. (1) by unanimous votes; (2) by numerical votes; (3) by *'nem con', i.e.,* neutral votes neither for nor against.

Here also take an example; if there are 100 members and if a special resolution has to be passed, supposing 99 members voted for the resolution and the remaining one person kept neutral, then this will not be construed as Special Resolution because this resolution lacks the condition that the votes in support of it should be three times the number of votes against it. Since no votes are polled against it we are constrained to state that there cannot be a special resolution technically.

It is also quite possible that minority members with a view to stave off passing of the Special Resolution may deliberately remain neutral and thereby defeat the *bona fide* purpose of passing a special resolution. Therefore it is imperative in the interest of the Company that in section 189 (2) the definition of Special Resolution is amended suitably in keeping with the harm or injury that may be caused by the minority shareholders occasionally. It is true minority interest must be safeguarded but the minority members should not be allowed to cause injury or hamper the business of the Company under the cloak of protecting their minority rights. Therefore the plea of minority rights in Companies should always be used as a shield but not as a sword.

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4. 1956 Edition Macdonald and Evans Ltd., 8, John Street, London W.C. 1.
5. (1876) 2 Q.B.D. 26.
6. Secretarial Practice in India, Law and Practice of Company Meetings by J. C. Bhal.

INTER-STATE COUNCIL—NEED OF THE HOUR

By

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Our Republican Constitution came into force in 1950 and it is now over three decades since we formulated Constitutional Government for our country. During this period, far-reaching changes have taken place in the Social, Cultural and Economic spheres of our national activity. The Preamble to our Constitution adumbrates the lofty ideals of 'Dignity of the individual and Unity of the Nation'. Article I of the Constitution says; "India, that is Bharat, shall be a Union of States", meaning thereby that our country is a Federation of States with defined functions. The re-organisation of our States after Independence and the formation of liguistic states has however brought about in a commendable measure, a viable administrative set-up and National unity in a diversity of States with different languages, cultural heritage, etc. Although Part XI of our Constitution deals with relations between the Union and the States, providing in Article 262, adjudication of disputes relating to inter-State rivers and river valleys, the true spirit and character of federalism has not pervaded our inter-State relations and that factor has caused friction in the administration of All-India Affairs affecting every State of our country to-day.

The reasons for the present crisis in National Affairs are not far to seek. Centrifugal forces and fissiparous tendencies have disrupted the Unity of our country and disputes of different kinds have often arisen in the recent past, between the States as well as between individual States and the Union of India. Oftentimes, political considerations have weighed with the powers that be in the matter of solution of disputes affecting the States and the country at large. Considering the vast size of the country and the alarming growth of population bringing in its train, economic problems of a baffling nature, an independent non-political body with well-defined functions and duties commends itself as the only alternative to the present perfunctory set-up, for which provision is made in our Constitution by the founding-fathers, with deep foresight and wisdom.

Article 263 of the Constitution of India provides for co-ordination between States thus:—

"If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

(*a*) inquiring into and advising upon disputes which may have arisen between States;

(*b*) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or

(*c*) making recommendation upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject;

it shall be lawful for the President, by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure."

The above Article of our Constitution has not yet been implemented and in the present juncture, the setting up of an Inter-State Council as provided for in the Constitution seems to be the need of the hour. Unless problems affecting the millions of our people living throughout the length and breadth of the country are solved at the All-India level by a competent body, National Integration will be impossible to achieve since the palliatives and *ad hoc* solutions attempted in recent years have proved futile in the face of complex disputes between the States over the sharing of river waters, delimitation of boundaries between States, cession of areas under agreements between States, sharing of benefits of Thermal and Power Projects and a multitude of other problems affecting more than one State which have acquired now national dimensions.

Hence, the formation of an Inter-State Council as envisaged by Article 263 of our Constitution will serve as an ideal body with a national character and evolve proper solutions to the various problems of a complex nature indicated above. Such a Council will be comprehensive in its approach to problems affecting all the States and ubiquitous in its utility to the Country as a whole. It is

interesting to note that section 135 of the Government of India Act, 1935, provided for an Inter-Provincial Council and the present Australian Constitution also provides for an Inter-State Commission for the solution of disputes *inter se* between States forming the Commonwealth of Australia and States *vis-a-vis* the Central Government. In our country, such a Council if constituted, can *inter alia* deal with national subjects like, links between the rivers flowing through different States, Afforestation, Flood Control, Environmental planning, checking forces of disruption and like problems. An Inter-State Council as a going concern could supplement and complement the work of the Planning Commission as well.

An Inter-State Council properly conceived should be bereft of political influence and consist of a top-notch *esprit de corps*, patriotic in its character with an All-India perspective, which will approach all problems, whether it be economic planning or border disputes or even social unrest undermining the Unity of the Nation, for the purpose of ushering in the laudable goals of our Sovereign Democratic Republic. Now is the time when the President of India functioning under the Constitution should constitute an Inter-State Council implementing Article 263 defining its functions and duties by appropriate guidelines. For, only then our Freedom will be a reality and our Nation a true Federation.

COMMENT ON A NOTE (1982) 1 M. L. J. (JOURNAL) PAGE 7) ON *CHANDRASEKARAN* v. *KUNJUVANNIAR AND OTHERS*, (1976) 2 M.L.J. 243: 88 L.W. 216: A.I.R. 1975 MAD. 227 (F.B.).

By

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The author of the note under reference has expressed before concluding his note, that the learned Judges of the Full Bench ought to have considered the effect of the inroads made by the special enactment into the Transfer of Property Act, and ought to have followed the principles of law enunciated by the Supreme Court. The view of the Full Bench, that the principle of *'nemo dat quod non habet'*, will have no relevance in the application of the inclusive definition of 'cultivating tenant', is not sound, according to the author of the note.

It is true, that there is no privity of estate or contract between the person, who is the owner of the subject-matter of lease, and the person, to whom the lease is granted. It is because, the creator of the lease is not the owner and in fact he is a person of limited interest or limited owner. If the principle of *'nemo dat'* is applied, after the expiry of the interest of the creator of lease, the lessee's interest would come to an end, which is evident from section 111 (*c*) of the Transfer of Property Act. It is worthwhile here to refer to the decision of Ismail, J. in *Ponniah Thevar* v. *Nallayam Perumal Pillai and others*[1]. In this case, the lessor was a life-estate holder. After the death of the life-estate holder, her tenant claimed protection of the Tamil Nadu Cultivating Tenants' Protection Act, 1955, as against the ultimate owner of the property. But the learned Judge negatived the claim of the appellant (tenant) and be based his verdict on section 111 (*c*) of the Transfer of Property Act.

A usufructuary mortgagee is also, like a life estate-holder, a person of limited interest. Subsequent to redemption by the mortgagor, the lease created by the usufructuary mortgagee would come to an end. According to the view of the Full Bench in *Chandrasekaran* v. *Kunju Vanniar*[2], if the lessee continues in possesion of the land, which is the subject-matter of the mortgage, and the lessee satistics the definition of 'cultivating tenant' as defined in section 2 (*a*) of the Tamil Nadu Cultivating Tenants' Protection Act, 1955, he is not liable to be evicted except on the grounds mentioned in the Act. The position of a usufructuary mortgagee is similar to that of a life-estate holder, in the sense, both are persons of limited interest.

But the Supreme Court has in *G. Ponniah Thevar* v. *Nellayam Perumal Pillai*[3], overruled the above decision and if its judgment is gone through, the reasoning on which, the Supreme Court has based its decision, appears to be somewhat similar to that of the Full Bench in *Chandrasekaran* v. *Kunju Vanniar*[2]. The Supreme Court has remarked, in its judgment that the Court is not concerned with any rights under any general or personal law, which may enable the remainderman to evict a tenant of a life-estate holder ?after her death. The terms of the statutory protection apply clearly to all tenancies, governed by the Act, (Tamil Nadu Cultivating Tenants' Protection Act, 1955), irrespective of the nature of rights of the person who leased the land, so long as the lessor was entitled to create a tenancy. It has been further observed, that there is nothing in the Act, itself, to show that the protection given to the cultivating tenant as defined in the Act, was given only against his original lessor and did not extend to subsequent holders of land, occupying the capacity of the landlord. The statutory definition of the term 'landlord' relates not only to the person, who created the lease, but contemplates and takes in every successive holder who would be entitled to evict a tenant. Furthermore, it is useful here to quote the observation of Supreme Court: "The obvious effect of such statutory provisions cannot be taken away or whittled down by forensic sophistry. Courts should not

1. (1976) 2 M.L.J. 260: 89 L.W. 41.

2. (1976) 2 M.L.J. 243: 88 L.W. 216: A.I.R. 1975 Mad. 227 (F.B.).

3. (1977) 1 S.C.J. 458: (1977) 2 An. W.R. (S.C.) 1: (1977) 2 M.L.J. (S.C.) 1: (1977) 2 S.C.R. 446: (1977) 1 S.C.C. 500: A.I.R. 1977 S.C. 244.

allow themselves to become tools for defeating clearly expressed statutory intention".

Justice Maharajan, remarked in the course of his judgment (before the question of law raised in *Chandrasekaran* v. *Kunju Vanniar*[4]), was referred to the Full Bench after quoting the Statement of Objects and Reasons, published in Part IV-A, of the Fort St. George Gazette, of 3rd August, 1955, at page 145, that it would be apparent from the statement, that the legislative intent was to give protection to cultivating tenants regardless of the fact, whether the tenants hold possession in pursuance of tenancy agreements with absolute owners or with any person such as a life-estate holder or a usufructuary mortgagee, entitled to evict the cultivating tenant from the holding. Further, he has observed: "There is no reason to suppose that the legislature intended to discriminate between different categories of cultivating tenants, who derived possession from absolute owners and deny protection to cultivating tenants, who derived possession from limited owners or usufructuary mortgagees. It may be noticed, that the Act makes serious inroads upon the rights of lessors and owners under the Transfer of Property Act, and under the common law of India. The Court ought not, therefore, to construe the effect of the special enactment, by grafting into it considerations imported from the Transfer of Property Act, or the common Law of India".

Finally, the author of the note has expresed that if the reasoning, on which the Full Bench has based its verdict is to be applied, even a tenant claiming tenancy agreement with a trespasser, is entitled to continue in possession and claim the benefits of the protection under the Act. Here, it becomes important to cite the decision of Venkataraman, J., in *Ayyappan* v. *Pechi and another*[5]. It is true, that the decision in this case, is based on the principle, whether there existed privity of estate between the owner of the land and the tenant from a person, having no title, to the land. Even though the above concept has been changed by the decision of the Full Bench in *Chandrasekaran* v. *Kunju Vanniar*[6], the observation by Venkataraman, J., in *Ayyappan* v. *Pechi*[5], appears to be important to be quoted. "If, as the learned counsel contends, the appellant is entitled to the benefit of immunity from this eviction, it would mean, that what a trespasser in the land cannot directed get against the true owner, he can secure to a sub-lessee from him by simply pretending to let out the land to the sub-lessee. Surely law cannot be so absurd as that".

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4. (1976) 2 M.L.J. 243: 88 L.W. 216: A.I.R. 1975 Mad. 227 (F.B.).

5. (1964) 1 M. L. J. 274: (1964) 77 L.W. 148.

6. (1976) 2 M.L.J. 243: 88 L.W. 216: A.I.R. 1975 Mad. 227 (F.B.).

A SITUATION TO BE REMEDIED IN INDUSTRIAL LAW

by
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The failure to send a second show cause notice to the accused workman or to take into consideration the past conduct of the said workman after he has been found guilty in the enquiry and before inflicting punishment on him where procedure stipulating these steps is prescribed by the Standing Order of the establishment in question or alternatively by the Model Standing Order has been held by the Supreme Court in *Lakshmirattan Cotton Mill's case*[1] to vitiate the entire domestic enquiry proceedings. This proposition has been followed in *Somarajan* v. *A.R.C. Engineering Works and another*[2] and *Machine Tools and Ancillaries Castings (P.) Ltd.* v. *Additional Labour Court, Madras*[3]. The rules for a fair and proper domestic enquiry and the procedural aspects have been well-settled by a number of notable decisions and there cannot be much difficulty in appreciating their importance from the point of view of labour. Now, once the domestic enquiry is fair and proper, the Labour Court can interfere with the quantum of punishment too on the erring workman in case such punishment is discharge or dismissal[4]. It is also well-settled that even if there was no domestic enquiry or the enquiry was defective, the Labour Court itself can go into the question of the misconduct of the workman and for such purpose take evidence and do all things necessary to arrive at a finding as to the guilt or otherwise of the charged workman. In short, the Labour Court can take up the role of a trial Court. *Manager, Larsen and Toubro Ltd.* v. *K. P. Gangharc*[5].

The question that is taken up for discussion in this article is this: If the domestic enquiry against the workman has been held to be fair and free from any of the vices that go to nullify it, should the fact of not giving an opportunity to the delinquent of being heard before punishment is imposed on him or not taking into consideration the past record of the delinquent before such punishment be allowed to frustrate the entire proceedings?

In interpreting industrial legislation, terms of doubtful import should be construed in favour of labour where it is possible. But the purpose of such legislation should not be lost sight of which is to bring about industrial amity, peace and good relationship between capital and labour. If by strict construction and technical meticulousness judicial intervention is going to introduce only irritants into the field, the purpose is lost. It is feared that this is what may have been achieved when the Supreme Court, when dealing with cases under Article 311 (2) of the Constitution prior to its amendment in 1976 which did away with the rule of second opportunity before imposition of punishment, held that the concept of 'domestic enquiry' envisages one continuous process from the serving of charge-sheet on the accused workman to the ultimate infliction of punishment on him, and that the postulation of the same as comprising the stage of enquiry and the stage of punishment cannot be sustained. *Bachhittar Singh* v. *State of Punjab*[6], *State of Assam* v *Bimal Kumar*[7] and *State of Mysare* v. *Manche Gowda*[8]. This is reiterated in *Somarajans case*[9]. In other words, the judicial dicta are that even though the domestic enquiry was fair, just and proper and the accused workman suffered no prejudice, for non-observance of a technical formality of not giving a second opportunity before punishment to the delinquent or taking into consideration his past conduct, the *whole* enquiry is vitiated. That is, the employer is back in square one.

This legal proposition that there can be no dichotomy in the concept of domestic enquiry and the whole procedure has to be gone through for non-observance of the rule relating to second opportunity at the punishing stage also appears to be not very consistent with commonsence. It is well-known that when a workman is tried for misconduct, the verdict cannot be influenced by extraneous factors including the

1. A.I.R. 1975 S.C. 1689.
2. (1982) 60 F.J.R. 21.
3. (1981) 1 M.L.J. 133.
4. S. 11-A of the Industrial Disputes Act (XIV of 1947).
5. (1973) 1 S.C.C. 813: (1973) 3 S.C.R. 587: A.I.R. 1973 S.C. 1227.
6. A.I.R. 1963 S.C. 395.
7. (1963) 1 L.L.J. 295.
8. (1964) 4 S.C.R. 540: A.I.R. 1964 S.C. 506.
9. (1982) 60 F.J.R. 21 at 28.

past conduct whether unsavoury or meritorious. *Girija Shankar Shukla* v. *Senior Supt. of P.O.*[10-11] *Central Bank of India Ltd.* v. *Prakash Chand Jain*[12].

They can have no sway and they play their part only at the time of considering the punishment. So it is not easily seen why a circumstance of denial of opportunity before imposition of punishment at the tail-end of the proceeding which is totally irrelevant for deciding the guilt of the workman should be permitted to vitiate the entire enquiry. Further, it has been held in *J. D. Jain* v. *State Bank of India and another*[13] following *State of Haryana and another* v. *Rattan Singh*[14], that in the case of domestic enquiry the employer need not prove the guilt of the workman as in a criminal trial. The criterion is the reasonable conclusion of the unfitness of the workman to continue in the employment and not guilt proved "beyond reasonable doubt" or to the hilt. Therefore, effacing the regular enquiry itself for failure to afford an opportunity to the delinquent to explain before actual punishment or to consider his past record before such a step would be attributing to the domestic enquiry in industrial law the canons of criminal jurisprudence.

There arises another interesting question of procedure. Is the Labour Court, which is enjoined to conduct the enquiry where in the eye of law there was no enquiry conducted by the employer as is the case with an enquiry that is hit the example we are discussing, going to bring it to a logical and proper conclusion by itself carrying out the provisions of the offended Standing Orders? The answer would appear to be 'yes', though it is not stated in so many words, judging by the concluding portion of the judgments of the Supreme Court in *Lakshmirattan Cotton Mills Case*[15] and the Madras High Court *Somarajan's case*[16] where they remitted the matter to the Labour Court for fresh disposal "in accordance with law." Justices Ismail and Sathar Sayeed, however, held in the *Machine Tools case*[17] that the non-observance of the Standing Order cannot be righted in that case which involved similar issues. The Court held that there was no request by the employer to the Labour Court to try the validity of the domestic enquiry as a preliminary issue and that if the finding went against, to give an opportunity to him to adduce evidence before the Labour Court. The Court observed: "In this case there was no such request made by the appellant herein before the Labour Court, even assuming that on the basis of any such request, the Labour Court can take further action."

This decision deviates from Justice Padmanabhan's thinking in *Somarajan's case*[18] and strikes a different note from that of the *Firestone Tyre and Rubber Company's case*[19]. This decision also leaves the question of the role the Labour Court is to play when conducting enquiry that was vitiated for breach of Standing Orders relating to the second opportunity and consideration of past conduct before punishment unanswered.

All the confusion and complexities of procedure could have been avoided if the domestic enquiry is held to be composed of two legally sustainable and independent stages so that if the first stage of the enquiry *viz.*, the serving of charge-sheet, examination of witnesses and finding of guilt by the Enquiry Officer does not offend the judicial conscience, the second stage of providing a second opportunity to the delinquent before awarding punishment or taking his past conduct into consideration before determining such punishment even if violated by the employer can be consummated by the Labour Court "in accordance with law." Thus a lot of time, labour and cost can be saved by unnecessary duplication of the proceedings relating to the first stage of the enquiry involving all the aforesaid steps that otherwise stood the judicial test. Such a conclusion also appears to be, it is respectfully submitted, more pragmatic, acceptable and rational.

10-11. A.I.R. 1959 All. 624; (1969) 1 L.L.J. 805 (All.)
12. (1969) 2 L.L.J. 377: (1969) 2 S.C.J. 583: (1969) M.L.J. (Crl.) 748: A.I.R. 1969 S.C. 983.
13. (1982) 60 F.J.R. 50.
14. (1977) 2 S.C.J. 140: (1977) 2 S.C.C. 491: (1977) Lab I.C. 845: A.I.R. 1977 S.C. 1512.
15. A.I.R. 1975 S.C. 1689.
16. (1982) 60 F.J.R. 21.
17. (1981) 1 M.L.J. 133.
18. (1982) 60 F.J.R. 21.
19. (1973) 3 S.C.R. 587: (1973) 1 S.C.C. 813: A.I.R. 1973 S.C. 1227.

NEED FOR STATUTORY NORMS IN ACCIDENT COMPENSATION

By

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Road accidents have increased at an alarming rate. The toll taken on lives by road accidents is said to be statistically second only to that taken by heart attacks. Not a day goes by without some accident being reported in the newspapers. More often than not a vehicle belonging to the public conveyance system is involved.

The Motor Vehicles Act was introduced in the year 1939 to control vehicular traffic and also to give compensation to the victims of accidents on the road. Since the year 1939 amendments have been made in the Act, some mere cosmetic changes, while others were more radical in their sweep. With the increasing number of accidents it would be worthwhile considering whether Parliament should enact a law giving statutory limitations to the amount of compensation payable in various cases, akin to the Schedule given in the Workmen's Compensation Act for accidents arising out of and in the course of employment.

There are several reasons why such limitations should be imposed. Many claims are being made which are not based on any norms whatsoever but are speculative in their character. This is so partly because the court-fee in a motor accident case is extremely low as compared with court-fees in any other case involving a like sum. It is also possible to file a pauper application. This is not to say that a plea is being made to increase the court-fee and bar poor litigants from making claims. However, it highlights the fact that many claims are made in a speculative spirit in the same manner in which a small sum is paid for a lottery ticket and if dame fortune smiles, the prize is large. Whatever may be the grief or sorrow of the relatives of the deceased it cannot be gainsaid that in many cases at least an element of commercialism creeps in at a stage when the first pangs of bitter grief have subsided.

The Motor Vehicles Act by not having any Schedule of compensation has permitted this spirit to be let loose and often such large sums of money are involved that it brings out the worst in human nature. The work of the Tribunals will also be much easier and simpler if well-defined limits are laid down by the legislature with only a little lee-way in the matter of awarding compensation being permitted.

The absence of any Schedule or guidelines in the laying down of the outer limits of compensation has resulted in various anomalies. Some Tribunals are excessively generous in the matter of awarding compensation while others are extremely stringent while doing so. The end result is the same so that innumerable appeals are filed and the Superior Courts in the country are faced with the task of enhancing or reducing the awards over a wide spectrum of claims. If Parliament were to indicate the upper and lower limits the claimants or those who have to pay may not think it worthwhile to embark on appeals where the difference in the ultimate would amount to a couple of thousands this way or that.

Apart from this there would be a symmetry in the compensation awarded by the States all over the country and the element of speculativeness in the matter of making claims will perforce be cut down. The only questions which will really call for argument would be questions of law relating to liability. A look at the amounts of liability with reference to the awards made by the various Courts the country over will bring to light the fact that there is no symmetry at all in the amounts of compensation given. For example a glance through the cases would show that some Courts have awarded compensation for the deaths of infant children at Rs. 2000, while others have gone to the extent of awarding even Rs. 20,000 or more.

In the case of children there is very little ground for presuming that these children

would definitely grow to be bread-winners for the family, or that they are geniuses who were nipped in the bud. It is common ground in almost all cases for the parents of deceased children to claim that their children were the brightest and cleverest and would have brought honour and glory to their parents but for their premature decease. In 99% of cases these claims have no basis, even assuming that the claims were true there is no guarantee that they would grow to ripe old ages and be the props and mainstay of their families. In fact they might later succumb to vicissitudes even had they not met with an untimely death. In many cases the parents of a female child are awarded compensation at a lower rate than for a male child. Needless to say that this smacks of injustice based on the grounds of sex and it may also be pertinent to point out that the present trend is that female children take care of the old parents as well or more devotedly than their brothers. Reverting back to the question of longevity the purchase factor being given for children contains grave elements of arbitrary speculativeness which can be overcome if a fixed schedule for compensation is laid down by Parliament. The fact that there is some judicial thinking along these lines is apparent in the judgment delivered by the High Court at Madras, *Kamalam and another* v. *M/s. Ashoka Transport and another*[1]. In that case a boy of 14 years riding on a bicycle met an untimely death due to the rash and negligent driving of the driver of the lorry. Mr. Justice Ramanujam has in that case drawn attention to the observations of Maharajan, J. in *Perumal and another* v. *State of Madras*[2]—"whereas the learned Judge has expressed the view that the compensation awardable for the death of an infant varied from 1,000 to Rs. 10,000 according to the discretion of the judge concerned and that the range of variation from one judge to another in fixing the amount of compensation is almost whimsical and beweildering. It is for this reason, he has suggested, that it will be desirable that the legislatare lays down guidelines, which would enable the Courts to fix the quantum of compensation in such matters in the light of prevailing sociological values. He has further observed as follows:—

"In fact, in England, the Council of Law Society to the Departmental Committee on the Alternative Remedies, recommended for the purpose of securing uniformity in fatal cases that a statutory scale should be provided for the calculation of damages for the loss of expectation of life....In the absence of statutory guidelines, I think that for the purpose of securing uniformity some workable formula should be evolved, which can be usefully followed by the trial Courts, after making marginal adjustments in the light of the peculiar facts of each individual case".

It is submitted that even in cases which are not fatal a Schedule with statutory guidelines as in the Workmen's Compensation Act should be made giving due weightage to factors like age, earning capacity, contributory negligence and disability resulting from the accident. In the case of children it must be remembered that a child handicapped as a result of an accident has to live with it, whereas in the case of a diseased child compensation should be much less or nominal as only the legal heirs of the child benefit by it.

Where adults are concerned too, amounts of compensation should be paid on a scale in conjunction with the earning capacity. The latter should be proved strictly. Age and health of the individuals also would necessarily have a bearing and some workable formula should be evolved taking all these factors into consideration, but without too much of deviation as to make awards by different Courts totally disparate.

Where public corporations are concerned, especially those run by the State as far as possible the matter should be settled out of Court, especially if negligence is proved on the part of the driver. While settling the matter the same norms referred to above should play a part in the settling of claims ouside the Court. A via-media amount

1. A.A.O. No. 499 of 1976.
2. (1971) A.C.J. 144.

may be offered with slight differences according to the facts of individual cases. If not settlement out of Court itself would be a matter of arbitrariness.

Where a bread-winner of a family has been brought to an untimely end the ages of his children, their minority or otherwise, his earning capacity and scope for future progress would all be important factors where judicial discretion will have to come into play. Nevertheless, even here some parameters have to be laid down.

By the enactment of a schedule or guidelines by Parliament uniformity in the decisions of the various Courts will necessarily follow; litigation will be cut down and in addition speculative claims can be cut down.

IS THE LIABILITY OF A SURETY REALLY COTERMINOUS WITH THAT OF THE PRINCIPAL DEBTOR?

By

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The answer seems to be in the negative.

Section 126 of the Contract Act (IX of 1872), defines a contract of guarantee thus:

"A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default".

According to the section the liability of a guarantor—'surety' springs into existence in case of default by the principal debtor—'third person'. Until default is committed by the principal-debtor the liability of the surety is in a state of animated suspension. It seems that the liability of the principal-debtor is primary and that of the surety only secondary. It is secondary because the section postulates default on the part of the principal debtor to saddle the surety with liability. When the default contemplated is a *sine qua non* for invoking relief against the surety, in the nature of things, the liability of both cannot be coterminous.

Further the sources of cause of action in both the cases are also different. In the case of the principal debtor it arises on his borrowing, but in the case of surety it arises on the contract of guarantee to the creditor.

One other point also points to a negative answer. The relief available to the creditor from them is also different. As against the principal debtor he is entitled to repayment of the amount lent. But as against the surety he is entitled to compensation for the loss suffered on account of breach of contract of guarantee. Though in both the cases money becomes payable, still they are differently labelled with a different nomenclature.

That the liabilities are not co-existent is also probablised by section 137 of the Contract Act. The section deals with a different aspect, namely, discharge of surety. But still the section is very much relevant for the present discussion. The section provides: "Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety". A question may arise whether the surety will be discharged in case the forbearance continues upto the expiry of the period of limitation. This is answered in the affir-

mative by section 134 of the Contract Act. According to section 134, if the creditor is guilty of any act or omission the legal consequence of which is the discharge of the principal—debtor, the surety is also discharged. Section 134 when considered in isolation means that omission to sue the principal debtor within the period of limitation will discharge the surety. Thus the two sections stare at each other creating a conflict. The conflict between the sections came up for consideration before various High Courts which gave divergent views. Majority of the High Courts in India followed the law in England, that is a failure to sue the principal-debtor until recovery is barred by the statute of limitation does not operate as a discharge of the surety. But the Allahabad High Court took the view that inspite of the provisions of section 137 the creditor's right against the surety was not preserved unless he sued the princip l—debtor within the period of limitation *Ranjit Singh* v. *Naubat*[1]. The conflict was resolved by the Privy Council in *Mahanth Singh* v. *U Ba Yi*[2] and it laid down that a failure to sue the principal debtor until recovery is barred by the statute of limitation does not operate as a discharge of the surety.

But in cases arising under pronotes in the execution of which surety also joins or where the surety executes a separate letter of guarantee on the same date, the date of commencement of liability is the same; that is the date of pro-note. This is laid down in *Brojendra Kishore* v. *Hindustan Co-operative Insurance Society*[3]. The liability will come to an end at the expiry of three years, if there had been no acknowledgment. But if there had been an acknowledgment by either of the two, the other will not be bound by it. The right will be saved *qua* one and not *qua* the other by whom there is no acknowledgement.

One thing that is common to both is the period of limitation, three years. In a suit against the principal debtor Article 21 (old Article 59) is applicable whereas in the case of surety Article 55 (old Article 115) is attracted. But in both the cases the terminus a *quo* is different. As against the principal debtor time begins to run from the date of his default and as against the surety from the date of failure to fulfil the promise on default by the principal debtor.

The above discussion discloses that the respective liabilities of the principal debtor and surety are not similar. If they are similar, contemporaneous and co-existent their legal incidents cannot be different.

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1. (1902) I.L.R. 24 All. 504.
2. (1939) 2 M.L.J. 253: 50 L.W. 27: 66 I.A. 198: A.I.R. 1939 P.C. 110.

3. I.L.R. (1917) 44 Cal. 978.

EXECUTION FOR RECOVERY OR EXECUTION OF CREDITOR.

By

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A creditor who feels complacent and satisfied soon after the passing of a decree in a money suit instituted by him, is living in a fools' paradise. His real nightmare commences only when he puts the decree in execution for recovery. The creditor who thinks that the certified copy of the decree, is a bill of exchange for his suit claim, gets a rude shock and awakening when he initiates the process for execution.

Proceedings relating to execution contained in the Civil Procedure Code are cumbersome and time-consuming and judicial interpretation of the various provisions have made it extremely difficult for the creditor to realise the fruits of his decree. The Government, the politicians and even some Judges of the High Court and Supreme Court treat the creditors with little sympathy and consider the debtors as down-trodden and go all out to help the debtors and in that attempt trample on the heads of creditors. This is unjust. This stems out of a mistaken notion that all creditors wallow in riches and all debtors are poor and down-trodden.

Before entering the threshold of the executing Court, the creditor has to cross one initial hurdle—the application to set aside the *ex parte* decree by the debtor. In most cases, the debtor sits on the wall and waits till an execution is levied. Immediately he rushes to Court with an application to set aside the *ex parte* decree accompanied by a stay petition. There is no limitation for the number of times the debtor could allow the suit to be decreed and the number of times an application to set aside the *ex parte* decree could be filed. This results in prolonged litigation. A tenacious and unscrupulous debtor can simply enervate and exhaust the creditor to sheer frustration and helplessness and hopelessness. The situation can be remedied by incorporating in Order 9, rule 13, Civil Procedure Code, a provision making it obligatory as a condition precedent for the debtor to deposit the decree amount or furnish security prior to entertaining his application. In title suits, no stay should be granted where a second or subsequent application under Order 9, rule 13, Civil Procedure Code, is filed.

The often abused provision in the whole of Civil Procedure Code, is section 47, which seeks to set a n aught, not only the execution proceedings even after completion of sale and delivery but also enables the judgment-debtor to question the legality or validity of the decree. This is engrafted as an exception to the general rule that the executing Court cannot go behind the decree. There is absolutely no justification legal or moral to allow a party to question the validity of a decree after the culmination of trial proceedings which he could have done before. The order under this provision is appealable and the proceedings can be treated as a trial of suit and so this gives a fresh handle to the judgment-debtors to protract the proceedings *ad infinitum*. If there is any legal or valid objections that could be raised, the party can be permitted to raise them in execution enquiries under Order 21, rule 58, rule 90, or rules 99 to rule 104 by incorporating suitable amendments to these provisions. Section 47, Civil Procedure Code, must therefore be deleted.

The next is the provision relating to arrest as adumbrated in section 51, Civil Procedure Code. The easy and enabling provision to compel payment by judgment-debtor has been made cumbersome and rendered almost nugatory by judicial pronouncements. It is of course understandable to insist on proof of means to pay by the debtors. But the other conditions requiring proof of dishonest intention of the debtors are meaningless and impose an unnecessary hardship on the creditor. How can the creditor prove the dishonesty of a debtor? The devil itself does not know what passes in human mind.

In *Jolly George Verghese and another* v. *The Bank of Cochin*[1], Justice Krishna Iyer declares: "Article 11 of International Covenant on Civil and Political Rights bans imprisonment merely for not discharging the decree debt. Section 51, Civil Procedure Code, embodies the same principle. Unless there be some other vice or *mens rea* apart from failure

1. (1979) 4 S.C.C. 550: 1980 Crl.L.J. 311: (1980) S.C.C. (Crl.) 125: A. I. R. 1980 S.C. 476.

to foot the decree. International law frowns on holding the debtor's person in civil prison as hostage by the Court. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligations under the decree." This view has been followed by our High Court in two decisions reported in *Anama Gounder* v. *A. C. Ponnuswami*[2], and *Sathyamurthy* v. *Sri Vasan Finance Corporation*[3].

All these decisions and section 51, Civil Procedure Code, proper, seem to emanate from an erroneous assumption that all creditors are enormously rich and all debtors are extremely poor and down-trodden. In our country, the reverse is the case. A debtor, having the means to discharge the decretal obligations, and defaulting in making payment is a cheat and a fraud. In such cases, what is the point in pontificating to the poor creditor about International conventions and human rights? Who will undertake to discharge his decree debt— any International Agency like the International Monetary Fund? We must be alive to the grim realities of the situation. There seems to be therefore no need for further proof to be adduced regarding dishonest intention. Section 51, Civil Procedure Code, should be amended by deleting proviso (*a*).

Finding that the process of execution by way of arrest of judgment-debtor unhelpful, if the creditor proceeds by way of attachment, he is faced with further hurdles under section 60, Civil Procedure Code. Section 60 (1) gives a *carte blanche* to the decree-holder for attachment and all the rights granted under section 60 (1) are taken away by as many as 19 provisos, which prohibit attachment.

The first relates to the necessary wearing apparel, cooking vessels, jewels etc., of the judgment-debtor, his wife and children. Who is to judge and on what basis what is necessary and what is not? To-day even luxury articles like Refrigerator, Air-conditioner and Radio are considered necessary. What will be an essential item of jewellery?

The next relates to the tools of artisan, implements of husbandry etc. Who is an artisan and with technological advancement, what can be considered as tools of artisan with modern farming methods, are tractors and power-tillers, agricultural implements? All these factors remain unanswered even after the amending Act of CIV of 1976.

The third exception relates to the dwelling house of an agriculturist and an agriculturist has been defined as a person who cultivates lands personally and who depends on agriculture as his main source of livelihood. Unfortunately this definition was further watered down by Act CIV of 1976, by defining personal cultivation as to include cultivation by relatives and farm servants or hired labour. This is in fact contrary to various tenancy legislations. In practice, this works great hardship to the creditors. For example, the creditor may be a poor widow. The debtor will be a rich mirasdar wallowing in wealth, owning hundreds of acres of lands in his name and in the names of his wife and children, cultivating them with hired labour, owning several furnished bungalows in his name and in the names of his wife and children, owning several cars and tractors and jewellery. In spite of all this wealth, section 60 prohibits the attachment of his bungalow, jewellery, car etc. What is the morality in having such a proviso?

Further, the exemption from attachment of allowances, salary to the extent of Rs. 400 Provident Fund amount, Insurance policy amount are all unrealistic and not suited to modern conditions. The exemption from attachment of the salary of soldiers, sailors and Airmen is discriminatory and offends Article 14 of the Constitution.

Section 60 must therefore be amended drastically by deleting all these exempting provisos which are unrealistic, unnatural and unnecessary.

The entire provisions relating to execution must be completely revamped and simplified. The provisions as they stand hamper and prevent recovery rather than facilitate it. The execution seems to be not for recovery but only to strangulate and execute the creditors.

If Kamban were alive to-day, he will redraft his Ramayana and say, "Kadan Koduthar Nenjam Pol Kalanginan Elangai Vendan".

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2. (1981) 94 L.W. 683.
3. (1982) 95 L.W. 102.

BOOKS REVIEW.

1. MULLA, CODE OF CIVIL PROCEDURE, FOURTEENTH EDITION by *J. M. Shelat,* in three volumes, (Publishers: N. M. Tripathi Private Limited, Bombay). Vol I, 1981. Rs. 150.

Mulla's Code of Civil Procedure, has been recognised for a long time as a standard treatise on the subject and justly rated high among the books dealing with the Code. The last edition appeared in 1965 and since then the Code has undergone extensive changes due to the enactment of the Code of Civil Procedure (Amendment) Act, CIV of 1976. The intervening period has also witnessed hundreds of judicial decisions shedding fresh light on the provisions of the Code. To revise is no doubt not to rewrite. Nevertheless while maintaining the style and structure of the work some rewriting is inevitable for incorporating the legislative changes and the perspectives presented thereby as well as the principles emerging from the authoritative decisions.

The present work, Vol. I, covers the sections of the Code. A Comparative Table of the sections of the Codes of 1882 and 1908 is given, and, in addition the effect of Amendments made by the Code of Civil Procedure (Amendment) Act, 1976, on various sections of the Code of Civil Procedure is succinctly presented. The commentaries under each section are refreshingly analytical and the statements are clear and lucid. While agreeing that to keep the work in manageable proportions a good deal of selectivity has to be exercised in including case law, yet one is left with the feeling that some important decisions may have escaped mention. The ruling of the Supreme Court in *Jolly George Verghes's case,* A.I.R. 1980 S.C. 470, calling for a new outlook in interperting section 51 (*a*) concerning arrest and detention in gaol of the judgment-debtor and holding that there must be some other vice or *mens rea* apart from failure to satisfy the decree debt to justify the debtor's arrest and the decision of the Madras High Court in *Sheik Suja-ud-din* v. *Arumugham,* (1980) 2 M.L.J. 472 on the same question merit notice. Equally the ruling of the Supreme Court in *Vishesh Kumar* v. *Shanti Prasad,* A.I.R. 1980 S.C. 892, laying down *inter alia* that if a revision is not maintainable under section 115 of the Code it cannot be treated as one under Article 227 of the Constitution might have been included.

It would have been gratifying if light had been thrown on some ticklish questions arising out of the amendments of 1976. For instance in section 11; *Explanation (VIII)*, the expression 'Court of limited jurisdiction' has been held by the Calcutta High Court in *Nahin Majhi* v. *Tela Majhi,* A.I.R. 1978 Cal. 440 (see also *Promode Ranjan Banerjee* v. *Nirapada Mondal,* A.I.R. 1980 Cal. 181) to mean Courts other than ordinary Courts such as Revenue Courts, Land Acquisition Courts, Administration Courts, Insolvency Courts, Guardianship Courts, Probate Courts etc. A different view has been taken in *Devaki Amma* v. *Kunhiraman Nair,* A.I.R. 1980 Ker. 230, where it is held that the expression 'Court of limited jurisdiction' includes civil Courts of limited pecuniary jurisdiction. The Andhra Pradesh High Court also seems to have reached the same conclusion in *Appala Lakshmi Narasamma* v. *Sundaramma,* (1981) 2 An.L.T. (N.R.C.) 15. The Editor's elucidation in view of his high position on this question would have been valuable.

Reading through the commentaries one is struck by the thoroughness shown in presenting the different aspects of the sections highlighted by the synopsis at the beginning. The excellence of the previous editions is fully maintained and the present edition is quite a welcome publication.

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2. MULLA, THE CODE OF CIVIL PROCEDURE (ABRIDGED EDITION) ELEVENTH EDITION by *P. M. Bakshi,* 1982 (Publishers: N. M. Tripathi Private Limited, Bombay). Price Rs. 85.

Procedure is a compendious name given to the rules, norms, forms and devices that govern the conduct of judicial proceedings designed to give each party to a dispute an equal and fair opportunity to present his side of the case before an unbiased Tribunal for adjudication. Far from being simple and easy to follow these rules have in course of time become complex and cumbrous and highly technical. The result is that litigation has become an immense, costly and time-consuming business.

The Civil Procedure Code, provides the rules relating to civil litigation and constitutes an important working tool of the lawyer. Conceived as a Students Book of modest size, the present edition of Mulla's book for the students runs to close on one thousand pages.

The book is not a summary of the principles under suitable topical headings but provides comments under each section and rule contained in the Code referring to leading decisions in an assimilable form, stated neatly and crisply. The Civil Procedure Code, underwent large-scale amendments in 1976 partly with the view of removing those provisions which experience showed tended to cause delay as in sections 47, 80, 100 and 115 and partly to introduce changes as would accelerate and be in the interests of social justice. Instances of the latter category are the amendments made in the proviso to section 60 (1) and those providing for compulsory legal aid to indigent suitors in certain cases.

In regard to section 60, clause (*m*) it is noted that the interest which a Hindu reversioner has in the immovable property of a deceased Hindu on the death of the deceased's widow is an "expectancy of succession by survivorship. Reversionary succession to a "widow's estate" is now practically abolished and the illustration given above has lost its aptness. The decision of the Supreme Court in *Shah Babulal Khimji* v. *Jayaben*, A.I.R. 1981 S.C. 1786, laying down that section 104 read with Order 43, rule 1, clearly applies to the proceedings before the trial Judge of the High Court exercising original civil jurisdiction, that an order reufsing to appoint a receiver or to grant interim injunction is appealable and that the concept of the Letters Patent only governing the internal appeals in the High Courts and the Code of Civil Procedure having no application to such appeals is based on a serious misconception of the legal position, has not been referred to, though divergence of judicial opinion and conflict between the various High Courts regarding the true scope, ambit and meaning of the word 'judgment' raging for more than a century is settled by this decision. Presumably the judgment of the Supreme Court was not available when the instant book matter went to the press.

Be that as it may, the comments are pointed, purposeful and easy to understand. The instant book brings the text up to date. The book has transcended the limitations of a students' book and will be a welcome accession to a junior lawyer's library.

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3. SATYARANJAN DAS ON THE LAW OF *Ultra vires* (TAGORE LAW LECTURES) SECOND EDITION by M. N. Das (Publishers: R. Cambray and Co., Private Limited, Calcutta). 1981. Price Rs. 130.

The expression *ultra vires* means beyond the scope, power or authority. It implies absence of capacity or power of a person, company, corporation or statutory body to do any act. For instance contracts purporting to be made by statutory corporations or companies beyond the powers conferred by statute or taken by the memorandum of association are *ultra vires* and void and they do not admit of ratification by the constituent members. It is not necessary that an act to be *ultra vires* should be illegal.

An enactment of a legislature will be *ultra vires* if it is in excess of its legislative power Similarly a rule will be *ultra vires* if it is beyond the rule-making power of the concerned Authority. It is truly said that "whenever any statutory provision be it of the Constitution or of any ordinary legislation or any principle of natural justice is in the least slighted, bypassed, ignored or violated in a manner colourable or otherwise by the executive or a quasi-judicial authority or even by the Legislature itself, the watchful eyes of the law of *ultra vires* come to the rescue of the victim". There can be no denying that particularly where there is a written Constitution the law of *ultra vires* plays a very significant part through grant of remedies like Declaration, *Certiorari*, *Certiorarised-mandamus* etc. The evolution and application of the doctrine, its scope and limitations form a fascinating subject of study.

In the present edition, the doctrine of *ultra vires* has been dealt with under fifteen chapters. Chapter 1 provides an Introduction. Chapter 2 deals with the General Nature,

Import and Principles of the Doctrine. The topics covered by the other chapters are: The Government of India; Civil Services in India; Local Government and Local Legislative Councils; High Courts; Constitution of India; Corporation; Municipalities; From Local Boards to Panchayats; Board of Revenue; Companies and Companies—Citizen or State? Though the lectures concerned were delivered at the commencement of the century they continue to be relevant and have been edited taking note of the changes in the country and outside in the domestic, economic and political spheres.

The author elucidates that the doctrine of *ultra vires* is of modern growth; it is purely a creature of judge-made law; it first began to take definite shape in cases upon acts done by railway and other companies formed under special Acts of Parliament; and, having originated in the best interests of trade and commerce the doctrine has been applied to all bodies having powers delegated to them by law either expressly or by implication. The doctrine rests upon public policy and commercial necessity and being once firmly established its operation could not be controlled. Having come into prominence in the middle of the last century in connection with railway companies the doctrine came to be applied to companies incorporated by Acts of Parliament and to other joint stock companies incorporated under the Companies Acts and to various bodies created by statute.

It is also pointed out that apart from the primary sense of the expression *ultra vires* as meaning beyond the powers given to a body either expressly or by implication by its constating instruments there is a secondary sense in which it is employed having advertence to the rights or powers of the individual persons who happen to be members of the body for the time being. The author states that an act which is within the potential powers of a corporation may not be within its actual powers and it can therefore exercise its potential powers in no other way than by overriding the right of one or more of the members.

The doctrine of *ultra vires* has come to us from England and is of wide application. The nature, working and growth of this doctrine naturally make an appeal to every earnest student of law. The instant book is one of absorbing interest and has great value for research purposes.

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4. INDIAN LAW OF MARRIAGE AND DIVORCE by *Kumud Desai,* Fourth Edition, 1981. (Publishers: N. M. Tripathi Private Limited, Bombay). Price Rs. 125.

Though the title of the book may suggest the existence a uniform territorial law of marriage and divorce in India, the book is one bringing together statutes like the Special Marriage Act, 1954; the Hindu Marriage Act, 1955; the Parsi Marriage and Divorce Act, 1936; the Christian Marriage Act, 1872, the Indian Divorce Act, 1869; and the Mahomedan Law of Marriage and Divorce including the Dissolution of Muslim Marriages Act, 1939. Topics common to the different marriage and divorce laws, such as restitution of conjugal rights, cruelty, desertion, adultery, alimony and custody of children are dealt with in a separate part. It is interesting to note that this part also carries chapters devoted to the Jeurish Law of Marriage and Divorce, Divorce by Custom among Hindus, change of religion by spouses and its consequences, Conflict of Laws etc.

The extensive amendments to the Hindu Marriage Act, 1955, by the Marriage Laws Amendment Act of 1976 have been carefully examined in the light of later case law. The author's opinions on knotty points have been frankly stated. Thus adverting to the Bombay High Court's approach that the concept of cruelty in section 13 (1) (*a*) must involve the same meaning as in English law in *Madanlal Sharma* v. *Santosh Sharma,* 1980 Mah.L.J. 391; the author points out that there is no warrant for such interpretation and that the "liberalising process which commenced with *Dastane* v. *Dastane,* A.I.R. 1975 S.C. 1534, where the Supreme Court departed from the rigorous requirement of English law was carried a step further by the amendment of 1976" and "that by the amendment the Act did not nullify the effect of *Dastane* v. *Dastane,* in fact gave legislative sanction to the view to depart from the rigid qualification and made

provision for more liberal interpretation" (*See* p. lvii). In *Soundarammal* v. *Sundara Mahalinga Nadar,* (1980) 2 M.L.J. 121: A.I.R. 1980 Mad. 294, referred to as a "marvellous decision" by Dr. Duncan Derrett it has been suggested that where a husband's wrong or misdemenaour or matrimonial offence originating before the judicial relief founding the petition under section 13 (1-A) continues during that year thereby precluding resumption of cohabitation, he cannot make the judicial relief the first stage of divorce in his own interest. Beyond a citation of the decision at page 94 there is no comment by the author. The latter's view on the matter would have been welcome.

There are 34 Appendices containing the rules framed by the Calcutta, Bombay and Madras High Courts under the Special Marriage Act, the Hindu Marriage Act and Divorce Act, the Rules of the Bombay High Court under the Parsi Marriage and Divorce Act, a part of the civil Code dealing with marriage and divorce in Goa, Daman and Diu, etc. The book under review is an excellent survey of the entire subject, a self-contained presentation of the law of marriage and divorce serving as a practical guide. It is a valuable contribution to legal literature.

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5. Hindu Law by *Tahir Mahmood* (Publishers: Law Book Co., Allahabad-1). 1981 Price Indian Rs. 100; U.K. £ 10; U.S. $ 20.00.

The Hindu Law attracting present day writers is not the Hindu Law of which John D. Mayne rapturously said it "has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decripitude". The Hindu Law forming the subject of present day treatises is for the major part the law laid down in the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956; and, the Hindu Adoptions and Maintenance Act, 1956; the law outside these Acts forming as it were a somewhat meagre addition Dr. Tahir Mahmood, the author of a stimulating book on the Muslim Law of India had also brought out in separate volumes his study of the Acts of 1955 and 1956 superseding the earlier Hindu Law. The book under notice consolidates all those volumes with a supplement forming Part V dealing with the "Law outside the 1955-1956 Acts. A feature of the new book is that each of the five Parts has its own separate Appendices. An Appendix to Part V contains an English version of a Portuguese Decree of 1880 relating to the Customs of Hindus in Goa. Another feature is the reproduction of the text of the Bill pending in Parliament which, when enacted, will have considerable impact on Adoption among Hindus namely, The Adoption of Children Bill, 1972. Reference is also made to the Bill now being actively considered to add "irretrievable break-down of marriage" an additional ground of divorce in section 13 of the Hindu Marriage Act.

Going through the book one is struck by the wealth of materials provided including the Rules and Forms under the different enactment, earlier legislation, related legislation and extracts from legislations having an impact either directly or indirectly on Hindu law principles. One has also to note that the author has waded through an enormous amount of judicial decisions rendered almost up to date.

One or two things may be mentioned. At page 713, the doctrine of pious obligation is stated to be based on the doctrine of right by birth. It will be more accurate to describe it as a sequel or corollary. The obligation at its inception was a duty independent of any question of right or property. In his comments on cruelty as a ground of divorce at page 102 *et seq* there is no reference to the Bombay High Court ruling in *Mandanlal Sharma* v. *Santosh Sharma,* 1980 Mah.L.J. 391, expressing the view that the concept of cruelty in section 13 (1) (*a*) of the Hindu Marriage Act must involve the same meaning as in English law even after the 1976 amendment. Again under section 23 (1) (*a*) the author does not refer to the decision of the Madras High Court in *Soundarammal* v. *Sundara Mahalinga Nadar,* A.I.R. 1980 Mad 294, holding that if the defaulting spouse persists in doing the same wrong which had formed the ground for the earlier petition filed against him, section 23 (1) (*a*)

will definitely prevent him from seeking relief for divorce; and if it can be shown that the person seeking relief under section 13 (1-A) has committed any further wrong apart from what has been pleaded in the earlier petition, or the wrong already committed is of a continuing nature, and such conduct is serious enough to justify the other party from complying with the decree that has been passed, the amendments effected to the Act do not enable such defaulting spouse to secure a decree for divorce.

The summaries provided in Part VI though relatively short constitute a brilliant and pithy presentation of the concerned principles. The book is a refreshing and welcome addition to the literature on the subject.

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6. Law of Marriage and Divorce in India by *B. P. Beri* (Publishers: Eastern Book Company, 34, Lalbagh, Lucknow-226 001) 1982. Price Rs. 100.

The motivation for writing and a special feature of this book is described thus: "A study which includes the steps of evolution of marriage and divorce to the present day, the complex considerations which are pressed into service in resolving the problems, is likely to be useful. An effort has been made in this direction not as a conventional commentary on the sections of the statutes but according to the topics that confront the lawyer and the legislator". (Preface). The object is laudable but to what extent the lawyers and legislators will allow themselves, to be helped will remain a moot point. It is stated, that the facts of the important English cases have been extensively extracted to enable the mofussil lawyer and the judge to appreciate the decision (*Ibid*). This is quite realistic notwithstanding the vociferous disfavour of some to the citation of British precedents and their advocacy of the need for evolving an Indian jurisprudence on all these matters.

The topics under which the study is presented in the instant book are: Institution of Marriage; Void and Voidable Marriages; Restitution of Conjugal Rights; Judicial Separation and Divorce; Bars to Relief; Maintenance and Alimony; Procedure and Practice; Children; Remarriage and Precedents. The Rules framed by the various High Courts and the Rules for Registration of Marriages of different States have been included. The texts of twenty concerned or related Acts have been provided as also relevant Extracts from the Indian Penal Code, sections 493 to 498; Criminal Procedure Code, 1973, sections 125 to 128; and Civil Procedure Code, 1908, Order 32-A.

Throughout the book the exposition of the law is lucid and analytical. The author makes a meaningful examination of case law and states his views with candour. At page 99 on the question of matrimonial home he thus observes: "Until the law accepts the principle of irretrievable break-down of marriages as a ground for relief when the wedlock becomes a dead-lock on account of disagreement on the location of a home the Courts will be called upon to decide the question. One may agree that the casting vote should not be the exclusive privilege of the male". At 137, in regard to constructive desertion he, rejects the subjective view that however bad the conduct of a spouse be he will not be guilty of desertion unless he intended to put an end to cohabitation as being often an elusive test, that a practical and pragmatic approach is preferable and that it is the presumptive test that should largely decide the cases. In regard to *Krishna Kumari's case*, 1980 M.L.R. 105 (P. and H.), where she a mother of two children became a Brahmakumari discontinuing her matrimonial obligations for two years and the High Court held her conduct amounted to cruelty and desertion and granted divorce, the author's criticism that it is not a case of cruelty at all though it may be constructive desertion and that it will be a ground under section 13 (1)) (*vi*) of the Hindu Marriage Act of entering a religious order is difficult to disagree. At page 54 the author cites *Suramma* v. *Ganpathalu*, A.I.R. 1954 A. P. 193, laying down that the marriage of a bridegroom below 18 with a bride below 15 is viod *ab initio* under the Hindu Marriage Act. The author adds that this view is open to doubt but fails to notice that the cited decision has been overruled by a Full Bench of the same High Court in *Venkataramana* v. *State*, A.I.R. 1977 A.P. 43 (F.B.). At page 183 in regard to the scope of the expression taking

advantage of his own wrong in section 23 (1) (*a*) while the author has cited a number of rulings there is no reference to the decision of the Madras High Court in *Soundarammal* v. *Sundara Mahalinga Nadar,* A. I. R. 1980 Mad. 294, striking a somewhat different note. The views of the author, a retired Chief Justice of a High Court, on all such matters will be very valuable and entitled to great weight. The book is a welcome publication.

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7 and 8. INDIAN PENAL CODE, 1860 by *V. B. Raju* Fourth Edition, 1982. (Publishers: Eastern Book Co., 34 Lalbagh, Lucknow.) Vols. I and II. Price Rs. 200 per set of two volumes.

The Indian Penal Code is more than twelve decades old. Drafted by Lord Macaulay it has won general acclaim for its draftsmanship and in the days when Britain was a colonial Empire the Code was applicable outside India also. It has also not undergone as many amendments as some other enactments. It is only of late that overhauling of the Code and large scale amendments thereto are being considered. The present work in two volumes is a section-wise commentary on the provisions of the Penal Code. Volume I covers sections 1 to 298 and Volume II section 299 to the end. There are also five Appendices, dealing with Intention, Knowledge, Intention and Knowledge, charge and Punishment, respectively.

A synopsis is provided under each section and comments given under each heading referring to case law. The comments are made with assurance and where the author differs from others he states his view in a forthright manner. At page 51 para. 11 it is stated: "The author submits that section 24 is exhaustive". No supporting reasons are given and the statement sounds like an *ipse dixit.* It is gratifying that generally the author's views are given in paras. headed "Author's view". One or two suggestions may be made. It would have added to the utility of the work if in an Introduction matters like concept of Crime and Criminal Liability the role of *mens rea* and modern trends and perceptions, the impact on the Penal Code provisions of gradual attenuation of sanctity of private property, criminal law as an instrument of social change etc., had been discussed. Case law citations have been made both in the body of the book as well as in the footnotes. In the absence of a table of cases it becomes difficult to verify if a particular decision has been taken into account. This needs to be remedied.

Glaring typographic mistakes occur at places. In the Preface itself, for instance, in line 9 "Compentary" should be "Commentary". Likewise in line 12 "crispmand lucid" should be "crisp and lucid".

It is true that commentators do not make the law; but often their views serve as beacon lights, much more so, as in the case of the author of the instant book, a retired Judge of the High Court with considerable judicial experience. The ingredients of all important offences have been clearly stated and model charges under relevant sections have been indicated. The instant book should serve well the bench and the members of the bar alike as a dependable guide on the subject.

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9. H. P. VARSHNI'S CRIMINAL TRIAL AND JUDGMENT THIRD EDITION, REVISED by *Dhirendra Pal Varshni,* 1981 (Publishers: Eastern Book Company, 34 Lalbagh, Lucknow). Price Rs. 60.

This book is primarily intended to afford guidance to presiding officers in Courts as well as to the members of the bar to avoid common mistakes, errors of law and procedure surfacing during the course of criminal proceedings and their disposal and thereby achieve appreciable reduction of work before the appellate Courts. In case schools for the training of magistrates are set up it is hoped that the instant book will be helpful in regard to such work as well.

The book is divided into three parts. Part I is devoted to the Concepts of the Rule of Law, Administration of Justice and Judicial Precedents and their value. Part II is

concerned with the Skills which cover Systems Approach to Criminal Justice, Preventive Orders, Cognizance of Offences by Magistrates and the Charge. Preliminary Inquiry, Trial before Magistrate, The Sessions Trial, Special Procedure at the Trial in Certain Cases, Rules of Evidence in Criminal cases and Interpretation of Penal Statutes, the Record of the Case, and, How to assess Evidence and deal with Confessions, Part III captioned "Attitudes" adverts to the Law Relating to Bails and Remand, Orders in certain Special Cases, Miscellaneous matters, Judgment in Criminal Cases, Judgments of Trial Courts and Appellate Judgments. There are three Appendices. Appendix A sets out the Constitution and Powers of Criminal Courts and Officers, being sections 6 to 25 of the Criminal Procedure Code, 1973. Appendix B furnishes the Forms relating to Preventive Orders and Appendix C deals with the Ordinary Powers of State Magisrtates, patterned on Schedule III of the 1898 Code of Criminal Procedure. The Preface to the present edition makes it clear that the appendix can only be said to be illustrative.

There is much truth in the author's observation (page 8) that "the essential factor in speedy and inexpensive Justice is not the machine but the man who runs it". In racing phraseology it is often the riding that does it. The author might have also added that satisfactory justice demands that justice should not only be done but must also be seen to be done. Procedure should be used not to harass and impede but to advance Justice. In Chapter IV—Systems approach to criminal Justice—Kipling's couplet:

"I keep six honest serving men,

They taught me all I know,

Their names are Who, Why and What

And When and Where and How."

is wholly apposite. All knowledge, skills and aptitudes acquired by a person are only through inquiry remorselessly pursued and without such inquiry one's outlook and understanding will be merely pedestrian and a Judge can never be a social engineer activising law as an instrument of social change. The author's treatment of the entire criminal procedure and allied knowledge in the different chapters collecting together different topics under one head is sure to prove helpful to practising lawyers as well as Judges. The notes and suggestions are lucid and the exposition is marked by a high decree of accuracy and precision. The book is a valuable contribution to the procedural law of criminal Courts.

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10. How to frame a Charge (under Penal Code and other Criminal Acts) by *Dhirendra Pal Varshni*, 1981 Edition. (Publishers: Eastern Book Company, 34 Lalbagh, Lucknow). Price Rs. 30.

Charge is the solemn act of calling before a magistrate an accused person and stating in his hearing in order that he may defend himself what is the accusation against him. In England it is known as indictment. Chapter XVII, Criminal Procedure Code, 1973 deals with the form of charge. It is a precise written formulation of the specific, accusation of the commission of an offence made by the Court against a person who is entitled to know its nature. Charge is not a mere formality but is a fundamental requirement of a criminal case. Its object is to ensure that the accused has sufficient notice of the matter with which be is charged and to enable the Court to keep in view the real points in issue and to confine the evidence to such points. Charges may take various forms and types. A charge may be under a single head or a composite charge. It may be in respect of a single accused or a number of them. The framing of the charge must of necessity be struck by the Court in warrant trials and sessions trials. Imperfections in the charge may vitiate a trial if prejudice is caused to the accused or occasions a failure of Justice. So charge-framing is more or less an art to be taken seriously, a practical discipline with a margin of flexibility for later adjustments if necessary but admitting of no vagueness.

The instant book elucidates all these aspects. In Chapter I the theory behind charge framing is considered. Chapter II is a survey from "concept to mundane". Chapter III discusses joinder and misjoinder of charges and clubbing of cases. Chapter IV covers charges before Magistrates and Chapter V charges before the Court of Session. Model Charges are provided in a further six chapters (1) under the Penal Code, (2) under the Arms Act,

(3) under the Prevention of Food Adulteration Act, (4) under the Essential Commodities Act, (5) under the Prevention of Corruption Act, and (6) under the Drugs and Cosmetics Act.

The book will serve as a dependable guide to Magistrates and Sessions Judges in framing charges and will be of great interest to the members of the criminal bar as well.

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11. COMPANY LAW by *Avtar Singh,* Seventh Edition 1982. (Publishers: Eastern Book Company, 34 Lalbagh, Lucknow). Price Hard Bound Rs. 45, Paperback Rs. 36.

Law provides two avenues to persons desirous of carrying on business jointly, namely, a partnership and a company. While a partnership may be better suited for small scale business with a group of persons having mutual trust and confidence taking a personal interest forming a company will be the better course particularly where mobilisation of large capital would be needed in view of the privilege of limiting one's personal liability for the debts of the business. No wonder the joint stock company has become the predominant form of business organisation and a key factor in the national economy. Indian Company Law originated with the Joint Stock Companies Act, 1850. The law has developed enormously since then and at present the Companies Act of 1956, as amended from time to time contains the law. The Act is not exhaustive and on points where no guidance is found in the provisions of the Act, decisions of English Courts in particular have been resorted to for light. Time does not stand still. With each passing year fresh problems of company law surface calling for new solutions and changes in the existing law. It is also a fact that the Act contains a lot of dead wood waiting to be chopped off for instance the provisions relating to managing agents. Company law has become a relatively complicated subject. To identify and present its basic and elementary principles calls for skill and experience.

The book under notice sets out the law in 24 chapters arranged under the heads Corporate Personality; Registration and Incorporation, Memorandum of Association; Articles of Association; Prospectus; Promoters; Shares; Shareholders or Members; Share Capital; Directors, Other managerial Personnel; Meetings; Dividends, Audit and Accounts; Borrowing, Lending and Investments and Contracts; Debentures; Majority Powers and Minority Rights; Prevention of Oppression and Mismanagement; Investigation; Kinds of Company; Reconstruction and Amalgamation; Defunct companies; Winding up; Voluntary Winding up; and Conduct of Winding up.

It is indeed gratifying that the author has taken into account even very recent decisions like the *Needle Industries Case,* A.I.R. 1981 S.C. 1298, holding *inter alia* that private companies and public companies do not between them exhaust the universe of companies and that three types of companies occupy a distinct place in the Companies Act, namely: (1) private companies; (2) public companies, and (3) private companies which have become public companies by virtue of section 43-A but which continue to include the three characteristics of a private Company. The author might perhaps have noticed also the rulings like *Harkishin Lakhimal Gidwani* v. *Achyut Kashinath Waghe,* 1981 Mah.L.J. 61, deciding that section 630 (1) would apply to a person who having properly come into possession of property was wrongfully withholding it after termination of his employment, or *M/s. Marikan (Motors) Ltd.* v. *M. L. Ravi Kumar,* 1981 Tax.L.R. 2529 (Ker.), discussing how far a Court has jurisdiction to interfere with the internal management of a Company. This however is a mionr matter. The book furnishes a clear and non-technical account of the salient provisions of the Indian Companies Act. Clarity and simplicity of language, analytical treatment, and the comprehensiveness of the case materials characterise the work. The book will be of great assistance to lawyers, students and to every one concerned with company matters.

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12. GUIDE TO FOREIGN EXCHANGE REGULATIONS by *P. L. Malik*, 1981 Edition. (Publishers: Eastern Book Company, 34 Lalbagh, Lucknow.) Price Rs. 45.

The term 'foreign exchange' for purposes of Parliamentary legislation covers not only control over it but also its acquisition in order to improve the economic stability of the country. The Foreign Exchange Regulation Act has as its main object the regulation of all transactions in foreign exchange affecting directly or otherwise import and export trade so as to ensure that the country's foreign exchange resources are utilised for the economic development of the country and malpractices of under-invoicing and over-invoicing are prevented. Leakage of foreign exchange arising out of tourism and employment of foreigners is sought to be plugged. Safeguards are provided against illegal inflow of foreign capital and outflow of foreign exchange. Control over repatriation of sale proceeds over exported goods is also tightened by requiring an exporter to make a declaration as required by section 18 and penalising untruth or falsity in any of the several particulars to be disclosed in such declaration. Important rules and regulations have been framed under the Act. The Central Government and the Reserve Bank are also issuing Notifications from time to time. An up-to-date compendium of all these materials together with interpretations placed by the Courts is therefore a desideratum.

The book under notice contains the Foreign Regulation Act, 1973; Foreign Exchange Regulation Rules, 1974; Adjudication Proceedings and Appeal Rules, 1972; Foreign Exchange Regulation (Publication of Names) Rules, 1975; Foreign Exchange Regulation (Authentication of Documents) Rules, 1976; Foreign Exchange Regulation (Encashment of Draft, Cheque or other Instrument) Rules, 1977 and Non-Resident (External) Account Rules, 1970; Notifications issued by the Central Government; Notifications issued by the Reserve Bank of India; Reserve Bank Directions in so far as they deal with (1) Import and Export of Bullion, Securities etc.; (2) Foreign Exchange Transactions by Banks with the public; (3) Export of Goods and Services; (4) Import of Goods; (5) Foreign Travel; (6) Sundry Remittances; (7) Joint ventures abroad; and (8) Foreign Investment in India. It is claimed that the material is made up-to-date till May, 1981.

The book provides, as it were, a complete armoury for the businessmen, the Enforcement Authorities under the Act and also for the lawyers. The comparative Table provided indicating the corresponding sections of the Act VII of 1947 in relation to the sections of the present Act XLVI of 1973 is a helpful feature. Important decisions like *Director of Enforcement* v. *M|s. Krishnaswamy*, A.I.R. 1979 S.C. 1969: (1980) 1 M.L.J. (S.C.) 47, have been noticed. The inclusion of an Introduction setting out the importance of Foreign Exchange and the various aspects of it would have enhanced the usefulness of the book.

13. LAW OF PARTNERSHIP by *Avtar Singh*, 1981 Edition. (Publishers: Eastern Book Company, 34, Lalbagh, Lucknow.) Price Rs. 60.

Partnership is one familiar type of business organisation; company is another. The Indian Partnership Act enacted in 1932 recognises and deals only with business partnerships in all its aspects of promotion, administration and dissolution. The Act is designed to foster a close bond of business relationship among the partners *inter se*, a relationship of trust and confidence measuring up to a high code of honesty. The Income-tax Act also encourages formation of partnerships by entitling them to certain tax benefits. A notable feature of the Partnership Act is its provision for the registration of firms. Though registration is not actually compulsory it is practically compulsory. To make firms go to the Public Register the device adopted is to cut short their ability to sue otherwise. Five decades have passed since the Partnership Act came into operation and quite a respectable amount of case law has gathered over the years in regard to the interpretation of its provisions.

The present book is divided into three parts. Part I presents detailed comments sectionwise on the provisions of the Act. The second part provides a set of practice points correlating the provisions of the Act with those of

the Civil Procedure Code like Order 30, showing how suits arising out of partnership affairs should be moulded. The last part endeavours to give a systematised set of principles emerging from the concerned statutory provisions and decisions as to the ascertainment of the genuineness of a partnership for taxation purposes. There are ten Appendices giving the Partnership Rules framed in the States of Andhra Pradesh (1957); Assam (1953), Bengal (1933), Bihar and Orissa (1933), Bombay (1932), Delhi (1972), Madras (1932), Mysore (1954), Punjab (1932) and Uttar Pradesh (1933).

The exposition is lucid and interesting. The extracts taken directly from judgments, and cited in support of the points made constitute a welcome feature. The commentaries, under each section are headed by a synopsis. At page 72 referring to the decisions in (1887) 10 Mad. 69 and (1907) 31 Bom. 25; it is remarked that both these decisions were *earlier to* the opinion expressed in *Abraham* v. *Abraham,* (1861-63) 9 M.I.A. 195 (P.C.). The remark should be that they were *later than* the Privy Council decision. Under section 69 (2), the decision in *Krishnan* v. *Aruna and Associates,* (1979) 2 M.L.J. 1, holding that a suit by an unregistered firm is *non est,* and under section 69 (4) the ruling in *Md. Khalil Rahaman* v. *Bhagabati Charan,* A.I.R. 1978 Cal. 321, that a suit for injunction and for accounts of a partnership between partners even if tentatively valued at Rs. 100 would not be covered by that sub-section might have been noticed. In the Preface, page (*i*), para. 2, line 3, mention is made of "Chronicity of litigation". *Chronicity* seems to be of new coinage.

The book under notice is an impressive presentation of the principles of partnership law, which is bound to serve well both lawyers and students.

14. THE BOMBAY TENANCY AND AGRICULTURAL LANDS ACT by *C. C. Anajwala,* Fourth Edition, 1982. (Publishers: C. Jamnadas & Co., Educational and Law Publishers, Bombay 400002.) Price Rs. 50.

Land reform has for its objectives, the evolution of an agricultural economy with high levels of efficiency and productivity and the elimination of elements of exploitation and social injustice within the agrarian system. Legislation was accordingly undertaken in the different States to confer on agricultural tenants security of tenure and freedom from arbitrary eviction, to prohibit transfer of holdings to non-agriculturists, to prevent rackrenting and to abolish absentee landlordism. The Bombay Tenancy and Agricultural Lands Act was enacted at the very threshold of Independence and has undergone a number of amendments since then.

The instant book contains full and up-to-date texts of the Bombay Tenancy and Agricultural Lands Act as in vogue in the Bombay areas of Maharashtra and the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958. There are eight Appendices giving The Bombay Tenancy and Agricultural Lands Rules, 1956; Notifications; The Bombay Tenancy and Agricultural Lands (Vidarbha Region) Rules, 1959; Extracts from the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961; The Mamlatdars' Courts Act, 1906; The Bombay Revenue Tribunal Act, 1957 and the Bombay Tenancy and Agricultural Lands (Bombay Revenue Tribunal Procedure) Rules, 1958.

The Introduction provides a study covering the different aspects of land reform up to the finalising the Sixth Plan for 1980 to 1985 with a wealth of statistics showing how far the objectives behind land reforms have been achieved. A commentary on the different sections of the Act, lucid and easily intelligible has been given and due note has been taken of the case law up-to-date. In the course of the comments the author has pointed out the lacunae in the law and made suggestions for meeting them. The author has rendered the understanding of what Chief Justice Chagla described as a "most complex law" as simple as possible. The book will be found useful by the Bench and the Bar, by lawyers as well as laymen.

15. SUPREME COURT LABOUR DIGEST, 1950—1976 by *S. K. Agrawal,* 1977. (Publishers: Law Book Co., Sardar Patel Marg, Allahabad 1.) Price Rs. 70.

A digest is a body of law or abstracts collected and arranged. It is an immense labour-saving device to the lawyer. Its enunciations have often served even as authoritative summaries of the originals. The ordinary law digest covers the whole field of law setting out briefly the points decided and the Journals in which the particular judgment is reported and it appears periodically. Specialised Digests are now coming into vogue, covering special subjects like labour, taxation, motor accidents or particular Superior Courts or sometimes both.

The development of an indigenous system of labour jurisprudence in India is entirely due to the Supreme Court. Verily Indian labour jurisprudence is a creation of the Supreme Court. Labour and industrial relations are never static. They are delicate, unpredictable and most important from the point of view of the country's economy. With new industries coming up rapidly and frequent enactment of new statutes, there has been a phenomenal output of precedents in this field covering the interpretation of the Industrial Disputes Act, the Minimum Wages Act, etc. Apart from these Article 311 of the Constitution has been responsible for a large number of decisions. Mr. Agrawal has therefore done well to bring out the Supreme Court Labour Digest.

The merit of a Digest depends on the analytical skill in arranging the topics, the ability to present the points considered in a crisp form, accurately and in simple language so as to make them quotable in Courts, the exhaustiveness of the parallel and cross-references, the awareness of the distinction between the main and ancillary matters decided. The present work measures up to all these requirements. Overruled and reversed cases have been mentioned, observations by way of *obiter dicta* are also noticed; citations provide the names of the parties as found in the judgments. The Digest is bound to prove popular.

16. K. D. Srivastava's Commentaries on Contract Labour (Regulation and Abolition) Act, 1970. Third Edition. Revised by *G. Saran*. (Publishers: Eastern Book Company, 34, Lalbagh, Lucknow.) 1982. Price Rs. 70.

Contract labour constitutes a large segment of unorganised labour in this country. A workman is deemed to be employed on contract labour in or in connection with the work in an establishment when he is hired in or in connection with such work by or through a contractor with or without the knowledge of the principal employer. Industrial adjudication generally does not encourage the employment of contract labour in modern times but the question in a given case is not to be decided on theoretical or academic considerations but also on the terms and conditions on which contract labour was employed in the particular case and the grievance made by the employees in respect thereof. So much prone to exploitation and so much without protection against the same were these classes of labour that demands of social justice and special protection to the weaker sections of society led Parliament to intervene and the Contract Labour (Regulation and Abolition) Act, 1970 was enacted. The 1970 Act was passed to prevent exploitation of contract labour and also to introduce better conditions of work for the workmen. The Act provides for regulation as well as for the abolition of contract labour. The policy of the Act is to abolish contract labour wherever possible and practicable and where it cannot be done away with altogether to so regulate the service conditions of labour as to ensure payment of wages and provision of essential amenities. The Act applies to every establishment in which 20 or more workmen are employed or were employed on any day of the preceding 12 months on contract labour. The Act does not apply to establishments in which work only of an intermittent or casual nature is performed. The Act provides *inter alia* for the setting up of Advisory Boards at the Central as well as State levels; registration of certain establishments; licensing of contractors; measures relating to health and welfare of contract labour like establishment of canteens, rest-rooms and first-aid facilities; responsibility for wages etc. The Act is no doubt a major break-through towards regulating the working conditions of contract labour. How far its objects have been achieved is anybody's guess.

Besides providing the text of the Act and section-wise comments in Part I in the light of decided cases, the book furnishes in Part II, The Contract Labour (Regulation and

Abolition) Central Rules, 1971; in Part III, The Contract Labour (Regulation and Abolition) Central Rules, 1971—Construction and Maintenance of Creches; and in Part IV the States Rules of Andhra Pradesh, Maharashtra, Rajasthan, Madhya Pradesh, Uttar Pradesh and West Bengal. The comments of the author are objective and conduce to easy understanding of the sections. The book will prove highly useful to all concerned with the implementation of the provisions of the Act.

17. THE BOMBAY INDUSTRIAL RELATIONS ACT, 1946 (XI OF 1947), WITH RULES AND NOTIFICATIONS by *C. C. Anajwala,* Fifth Edition, 1982. (Publishers: C. Jamnadas & Co. Shamaldas Gandhi Marg, Bombay-400 002.) Price Rs. 30.

Industrial disputes and labour welfare are in the Concurrent Legislative List both under the Government of India Act, 1935 as well as under the Constitution of India. Both the Bombay Industrial Act, 1946 (Bombay Act XI of 1947) and the Industrial Disputes Act, 1947 (XIV of 1947) are pre-Independence statutes. The State Act being posterior to the Central legislation and having been assented to by the Governor-General as required by section 107 (2) of the Government of India Act its provisions prevail over any corresponding provisions of the Central Act in case of any repugnancy. The Bombay Act operates concurrently with the Central enactment, the Industrial Disputes Act, 1947. It is now familiar knowledge that a Bill is pending before Parliament to exclude Hospitals, Educational Institutions, etc., from the all-embracing interpretation of the term industry in *Bangalore Water Supply & Water Sewerage Board* v. *Rajappa,* A.I.R. 1978 S.C. 548.

The instant book in the Introduction deals with all these matters. It then goes on to furnish lucid comments supported by case law up-to-date on the provisions of the Act. There are five appendices containing respectively. Notifications issued by Government regarding application of the Act to various Industries; the Bombay Industrial Relations Rules, 1947, the Labour Courts (Practice and Procedure) Rules, 1947; the Bombay Wage Board Rules, 1948, and the Industrial Court Regulations, 1947. Though a State Act, the problems arising and situations dealt with thereunder have their interest for the rest of India as well. The instant book will be of great assistance to employers and employees; Labour and Industrial Courts, members of the Bar and students of Industrial and Labour Laws.

18. CENTRAL EXCISE TARIFF OF INDIA, 1982-83 (Ninth Edition) by *R. K. Jain.* (Publishers: Central Law Office, 3584, Netaji Subhash Marg, Darya Ganj, New Delhi-110002.) Price Rs. 70.

Excise is a word of vague and somewhat ambiguous meaning. While duties of custom are levied on goods going abroad or imported from abroad, duties of excise are levied on home-made goods or goods made in the taxing country. It is essentially a tax on articles produced or manufactured in the taxing country and intended for home consumption. The Finance Act, prescribes each year, the tariff for the year; excisable goods are specified in the First Schedule of the Central Excises and Salt Act as being subject to a duty of excise. If a product is neither defined in the First Schedule to that Act nor defined in the Act it should be classified according to the popular meaning or according to its commercial sense.

The instant book points out. How to use this tariff and follows it with a Commodity Index. It provides comments on Budget Changes in 1982-83 and then gives comments on classification of excisable goods, valuation of excisable goods and exemption from duty. It adverts to exemption to manufacturers having annual clearances of less than Rs. 20 lakhs, Special Duties of Excise and General Exemptions. It deals with the Central Excise Tariff relating to the various items referring to the relevant case law. There are three appendices the first two devoted to 'Additional duties of excise on textiles and textile fabrics (Appendix I); Additional duties and cesses leviable under other Acts (Appendix II) and the third furnishing a Chronological List of basic notifications issued in respect to Items of Central Excise Tariff (Appendix III). The author has invited special attention to the fact that by virtue of the declaration made in the Finance Bill, 1982 under the Provisional collection of Taxes Act, 1931, the provisions

relating to the imposition or increase of duty proposed under clauses 43 to 47, and 49 to 53 of the Finance Bill, 1982 have the force of law and such changes shall take effect from the midnight of 27th February, 1982|28th February, 1982. The book will be immensely useful to businessmen, traders and merchants in particular.

19. COMMENTARY ON THE MAJOR PORT TRUSTS ACT, 1963 (ACT XXXVIII OF 1963), (as amended by the Major Port Trusts (Amendment) Act, 1974 by *A. B. Gandhi*, First Edition, 1st January, 1982. (Publishers: Milan Law Publishers, 15|2, Navjivan, Bombay-8.) Price Rs. 55.

The term 'port' denotes a natural or artificial haven or access of the sea to which ships may conveniently come and at which they may load or unload. With the rapid expansion of overseas travel, trade and commerce the development and administration of ports and control of traffic through them have assumed great importance. The Port Trusts at Calcutta, Bombay and Madras are statutory bodies governed by the Calcutta Port Act, 1890, Bombay Port Trust Act, 1879 and the Madras Port Trust Act, 1905. Since then other major ports have emerged. The Major Port Trusts Act of 1963 was enacted with a view to bring certain major ports in line with the statutory port trusts of Calcutta, Bombay and Madras. Since then this Act has been amended by the Major Port Trusts (Amendment) Act, 1974, so as to make the Act as amended applicable to Calcutta, Bombay and Madras ports also. A notification, dated 1st February, 1975 has been issued by the Central Government appointing that date as the date on which the Amended Act is to come into operation.

The instant book is a commentary on the Act of 1963 as amended in 1974 taking into account whatever decisions have been rendered in relation to the provisions of the Act and making judicious use of decisions under the provisions of the Calcutta, Bombay and Madras Acts. The book will prove useful to lawyers, traders and others concerned with or interested in the administration of the ports.

20. MAKING OF INDIA'S CONSTITUTION by *H. R. Khanna.* [Judge, Supreme Court of India (retired)] 1982. (Publishers: Eastern Book Company, 34, Lalbagh, Lucknow.) Price Rs. 40.

The making of India's Constitution is a fascinating story. Talleyrand said that a Constitution must be short and obscure if it was to work. Sir Ivor Jennings criticised the Indian Constitution as being too long and complicated as would lead to rigidity. The criticisms have been belied. Mr. Khanna points out that the length of the Constitution has not led to its rigidity. The Constituent Assembly met for the first time on 9th December, 1946 and its deliberations continued till 26th November, 1949.

In the present book which contains the text of the three Sulakhani Devi Mahajan Memorial Lectures delivered on 23rd, 24th and 25th March, 1981, Mr. Khanna has traced the various changes made in the original draft Constitution of India during its passage through the Constituent Assembly and the final shape given to the Constitution. He has added his own comments on various aspects of the Constitution. Mr. Khanna recognises that the Constituent Assembly as such represented the very cream of those in the public life of the Country, a body of individuals who for sheer brilliance and talent, for breadth of vision and comprehension of basic problems, for deep learning and erudition were unrivalled in our history (page 6), that its deliberations throw a flood of light on national thinking on the political plane (page 11), that one of the remarkable features in the drafting of the Constitution was about decision making by consensus, the two persons mainly responsible for it being Nehru and Patel (page 115) and that in bringing about the smooth integration of the Princely States Sardar Patel showed "supreme qualities of statesmanship and nation-building, of vision, sagacity and foresight synthesised with firmness, generosity and human understanding, which, perhaps, have seldom been equalled and never surpassed" (page 113). Mr. Khanna states *inter alia* that the genesis of the provision in Article 15 (3) in relation to making of special provision for women and children was a talk between Mr. B. N. Rau and Justice Frankfurter, in Washington (page 28) and the question of

functional representation like special representation for commerce and industry and for labour in the Upper House was considered and given up after Mr. B. N. Rau had been told by De Valera and the Irish Attorney-General that functional representation had worked badly (page 77).

Mr. Khanna's survey of the discussions in the Constituent Assembly is penetrative and illuminating. His inclination seems to be in favour of a strong centre, as shown by his observation: "It is no mere accident that the most glorious Chapters of India's history have synchronised with the periods when we had a strong and stable Centre" (page 97). He is forthright when he says "serious harm can be done by the language fanatics seeking forcibly to impose a language" (page 106); "One of the great forces for cementing bonds of unity and oneness is the judicial systems. . . . . . The judicial system has proved to be a great unifying force. This has been mainly due to the fact that the language of the High Courts has been the same, namely, English. Any attempt to replace English as the language of the High Courts is likely to affect the oneness and integrity of the judicial system (page 107). Few can disagree with his conclusion: "Whatever may be the provisions of the Constitution, its ultimate success and effectiveness for public weal depends upon the persons who work them and the way those provisions are worked "and" Eternal vigilance is the price of liberty and in the final analysis its only keepers are the people. Imbecility of men, history teaches us, always invites the impudence of power" (pages 120, 121). The book is of absorbing interest.

21. SHORTER CONSTITUTION OF INDIA by *Durga Das Basu*, Eighth Edition, 1981. (Publishers: Prentice Hall of India Private Limited, New Delhi-110001.) Price Rs. 120.

The subject of the Indian Constitution is of great interest to all sections of the people. The Constitution is the basic law relating to the government of the country. It states not the rules for the passing hour but the principles for an expanding future as well. Among the authoritative books on the Constitution are those by H. M. Seervai, Gajendragadgar and Durga Das Basu. Mr. Basu has in fact produced a number of books on the subject. The Shorter Constitution of India, now in its Eighth Edition is one of them. Unlike the previous edition which appeared in three volumes the present edition is a single, neatly printed volume. The text of the Constitution is as it has emerged after the 43rd and 44th Amendments. The author has provided comprehensive annotations under each Article taking into account the decisions rendered up to August, 1981. The notes are analytical, packed with information and lucid. The outlook is critical. Thus at page 141 it is pointed out how despite the blows suffered by *A. K. Gopalan's case* in *Maneka Gandhi's case* and other decisions, a 1980 Constitution Bench has in *Bachan Singh's case,* A.I.R. 1980 S. C. 898, instead of overruling the *Gopalan case* affirmed the majority view as to the applicability of Article 19 (1) to laws falling under Article 21. On the question of *locus standi* to move the Court under Article 32 in the *Judges' Appointment and Transfer case,* decided recently a new doctrine as it were, has been postulated, namely, "that" if there is a person or class, or group of persons who by reason of poverty or disability or socially or economically disadvantaged position, is not in a position to approach the Court, any member of the public would have *locus standi* to move the Court for judicial redress of the legal injury caused to such person or class or group of persons by reason of violation of their legal or constitutional right or legally or constitutionally protected interest and that where injury to public interest or public injury is caused as a result of breach of public duty owed by the State or any public authority or as a result of the violation of some constitutional or legal provision by the State or any other public authority, any member of the public having sufficient interest can move the Court for judicial redress". This doctrine however, came to the fore subsequent to the publication of the present book.

It is interesting to note according to the author, that Part IV-A—Fundamental Duties — resulted from the Swaran Singh Committee's taking up the suggestion made by the *author* in this behalf in his Tagore Law Lectures on Limited Government and Judicial Review.

The instant book provides all the material that an active legal practitioner would need in his every day practice. It is a welcome addition to the literature on the subject.